Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

METRO LIGHTS, L.L.C.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER LANDAU, P.C.
Counsel of Record
LAURA ALEXANDER
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5087

August 31, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether this Court should resolve a circuit conflict on the precedential effect, if any, and meaning of its fractured decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), with respect to First Amendment constraints on governmental regulation of commercial signs.

2. Whether Los Angeles' selective and underinclusive ban on commercial signs violates the First Amendment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Metro Lights, L.L.C. states that substantially all of its assets, including this lawsuit, were purchased by a privately held Delaware limited liability corporation, Metro Fuel, L.L.C., in August 2006. No publicly held corporation owns 10% or more of petitioner's stock.

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INTRODUCTION

There are few areas of this Court's First Amendment jurisprudence in greater need of clarification than the analysis applicable to governmental regulation of commercial speech in general, and governmental regulation of commercial signs in particular. When this Court last visited this area of the law almost thirty years ago in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), it was unable to produce a majority opinion. Since then, the Court's commercial speech jurisprudence has evolved significantly, and subsequent cases have firmly embraced the tenet that underinclusive regulations violate the First Amendment because they undercut the justification for restricting speech in the first place.

In this case, however, the Ninth Circuit insisted that *Metromedia* establishes binding law in the specific context of commercial sign regulations, and interpreted that case effectively to immunize selective bans of commercial signs from underinclusivity analysis. As the Ninth Circuit delicately put it, while this Court's subsequent cases "may seem to be in some tension" with *Metromedia*, "we are bound to follow the Supreme Court precedent most directly on point." Accordingly, the Ninth Circuit held that *Metromedia* foreclosed the First Amendment challenge to the commercial sign regulations at issue here as a matter of law.

This petition gives this Court an opportunity to clarify its commercial speech jurisprudence as it relates to the recurring and much-litigated issue of governmental regulation of commercial signs. The root of the problem lies in *Metromedia* itself. For

almost thirty years, the question of how to interpret and apply that splintered decision has bedeviled the lower courts, and the problem has only grown more acute as this Court's commercial speech jurisprudence has continued to evolve. The federal courts of appeals are in open and notorious disagreement over what, if anything, *Metromedia* means, with some courts holding that *Metromedia* establishes no binding law at all, and other courts (like the court below) holding that *Metromedia* not only establishes binding law but gives governments virtual *carte blanche* to restrict or ban commercial signs.

By declaring that its hands were tied by *Metromedia*, and that only this Court could revisit that decision, the Ninth Circuit invited this Court to do just that. Petitioner now respectfully asks this Court to accept that invitation, to dispel the confusion into which *Metromedia* has plunged the lower courts, governmental regulators, and regulated entities, and to reverse the Ninth Circuit's conclusion that the selective and underinclusive ban on commercial signs at issue here passes First Amendment muster.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 551 F.3d 898 and reprinted in the Appendix ("App.") at 1-34a. The district court's decision is reported at 488 F. Supp. 2d 927 and reprinted at App. 37-90a.

JURISDICTION

The Ninth Circuit rendered its decision on January 6, 2009, App. 1a, and denied a timely petition for panel rehearing and rehearing *en banc*

on April 16, 2009, App. 35a. On June 29, 2009, Justice Kennedy granted petitioner's application to extend the time within which to petition for certiorari until August 31, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT MUNICIPAL CODE PROVISIONS[1]

Los Angeles Municipal Code § 91.6205.11 (now codified as Los Angeles Municipal Code § 14.4.4(B)(11)) provides in pertinent part:

> **Prohibited Signs**. Signs are prohibited if they: ... [a]re off-site signs, ... except when off-site signs are specifically permitted ....

Los Angeles Municipal Code § 91.6203 (now codified as Los Angeles Municipal Code § 14.4.2) defines an "Off-Site Sign" as:

> A sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where the sign is located.

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[1] While this case was pending in the Ninth Circuit, the Los Angeles City Council moved the Sign Ordinance from one part of the Municipal Code to another. This change had no substantive effect on the provisions at issue here. For ease of reference, this petition continues to refer to those provisions by the Municipal Code section numbers used by both the Ninth Circuit and the district court.

Los Angeles Municipal Code § 91.101.4 provides in pertinent part:

> The provisions of this Code shall apply to the construction, alteration, moving, demolition, repair, maintenance and use of any building or structure within this jurisdiction, except work located primarily in a public way ....

Los Angeles Municipal Code § 91.101.5 provides in pertinent part:

> The provisions of this Code shall not apply to any of the following: ...
>
> 8. Work in a public way ....

STATEMENT OF THE CASE

A. Factual Background

Petitioner Metro Lights, L.L.C. is a small advertising company that operates in several cities around the country, including respondent City of Los Angeles, California. App. 7a, 50-51a. Metro Lights posts commercial signs, typically four feet by six feet in size, on private property leased for that purpose. App. 50-51a.

In 2001, Los Angeles entered into a 20-year contract with a major advertising conglomerate, CBS (then known as Viacom Decaux LLC). App. 5a, 43-45a. Under that contract, the City gave CBS the exclusive right to post commercial signs on city-owned transit shelters along city streets (known as "Street Furniture") in exchange for payments amounting to at least $150 million. App. 45a. The commercial signs posted by CBS on the City's Street Furniture are similar in size and content to the commercial signs posted by Metro Lights. App. 52a,

69a, 78-79a (citing photographs reprinted at App. 91-92a).

Several months after entering into that lucrative agreement, Los Angeles amended its municipal Sign Ordinance to substantially restrict any other commercial signs within city limits. As amended, the Ordinance generally prohibits any new offsite commercial signs in the City. *See* L.A. Mun. Code § 91.6205.11 (now codified as L.A. Mun. Code § 14.4.4(B)(11)) (prohibiting "off-site signs, ... except when off-site signs are specifically permitted ...."). The Ordinance defines an "off-site sign" as "[a] sign that displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where such sign is located." L.A. Mun. Code § 91.6203 (now codified as L.A. Mun. Code § 14.4.2)). Although the Ordinance purports to be based on traffic safety and aesthetic concerns, *see* L.A. Mun. Code § 91.6201.2 (now codified as L.A. Mun. Code § 14.4.1), it creates two substantial exemptions that have no conceivable relationship to either traffic safety or aesthetics. First, the Ordinance exempts "work located primarily in a public way," which includes Street Furniture. *See* L.A. Mun. Code §§ 91.101.4, 91.101.5. Second, the Ordinance by its terms exempts all non-commercial signs. *See* L.A. Mun. Code § 91.6203 (now codified as L.A. Mun. Code § 14.4.2).

The amended Ordinance essentially shut Metro Lights out of Los Angeles. Indeed, beginning around December 2003, the City issued Metro Lights

numerous citations for violating the Ordinance. App. 7a, 39a, 51a.

B. Procedural History

In February 2004, Metro Lights filed this lawsuit against Los Angeles under 42 U.S.C. § 1983, asserting that the Ordinance violated its First Amendment rights and seeking declaratory and injunctive relief and damages. App. 7a, 38-42a. While the lawsuit was pending, Metro Lights sought a preliminary injunction against enforcement of the Ordinance, which the district court (Feess, J., C.D. Cal.) granted. App. 7a.

After limited discovery, the parties filed cross-motions for summary judgment. The district court, as relevant here, granted Metro Lights' motion. In a lengthy opinion, the court analyzed the Ordinance under the legal standard governing regulations on commercial speech set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). App. 37-90a. The court concluded that the Ordinance was far too underinclusive to "directly advance" the City's asserted interests in traffic safety and aesthetics in a narrowly tailored way. App. 68-85a. "The City cannot, on the one hand, preclude [Metro Lights] from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles." App. 76a. The court noted that the City had "many alternatives" that were more speech-friendly to accomplish its asserted objectives, including "[m]ost obviously, ... impos[ing] the same requirements on other private

advertisers as it did on [CBS]," *i.e.*, "the City could require that any advertisements meet certain specifications—including size and location—to promote the City's goals with regard to traffic safety and aesthetics." App. 84a.

The district court distinguished *Metromedia* as establishing only that an exemption for onsite commercial signs (*i.e.*, signs related to goods or services provided at the premises where the signs are located) did not render a general ban on offsite commercial signs unconstitutionally underinclusive. App. 82-84a. The Ordinance at issue here, the court explained, "goes well beyond the scheme addressed in *Metromedia*," because the Ordinance "purports to ban all off-site signs on private property," but through the exemption for Street Furniture "not only permits but appears to encourage their display on public property throughout Los Angeles." App. 83a (emphasis added); *see also id.* (noting that "the City's Sign Ordinance purports to, but does not, accomplish a complete ban and is instead pierced with a colossal exception"). Because the underinclusivity analysis in *Metromedia* was limited to the exemption for onsite commercial signs, the court declared, "*Metromedia* ... provides no support for the City's position in this case." App. 84a.

Los Angeles appealed, and the Ninth Circuit not only reversed the grant of summary judgment in Metro Lights' favor, but directed the entry of judgment in the City's favor as a matter of law. *See* App. 1-34a. According to the Ninth Circuit, *Metromedia* squarely foreclosed Metro Lights' First Amendment challenge to the Los Angeles Ordinance. *See* App. 16-33a. Unlike the district court, the Ninth

Circuit did not read *Metromedia* as limited to the question whether an exemption for onsite commercial signs renders a ban on offsite commercial signs unconstitutionally underinclusive. Rather, the Ninth Circuit read *Metromedia* far more broadly as effectively rejecting *any* underinclusivity challenge to a ban on offsite commercial signs. App. 18-27a.

In particular, the Ninth Circuit declared, "[t]he Court in *Metromedia* squarely faced an underinclusivity challenge to San Diego's law and rejected it." App. 24a; *see also* App. 20a ("*Metromedia* explicitly addressed an underinclusivity challenge."). While the panel acknowledged that "such challenge focused on the exclusion of onsite signs," the panel emphasized that "the [*Metromedia*] Court did note [an] exception for 'other specified signs' at the start of its substantive discussion," and "[m]ore importantly, nothing in its analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of a problem, binds its holding inextricably to the particular onsite-offsite distinction." App. 24a; *see also id.* at 25-26a ("[M]ost importantly, *Metromedia*'s ... emphasis on deference to legislative judgment, resounds quite clearly in this case. ... The *Metromedia* Court declined to overrule a legislative judgment [that a selective ban on commercial signs is effective] and so do we.").

By holding that *Metromedia* "compels" the conclusion that the Los Angeles Sign Ordinance passes First Amendment muster, App. 33a, the Ninth Circuit dismissed Metro Lights' case-specific underinclusivity arguments. Similarly, the court dismissed any efforts to square *Metromedia* with this

Court's subsequent caselaw. According to the Ninth Circuit, any "tension" or "inconsistency" between *Metromedia* and such subsequent commercial speech cases as *City of Cincinnati v. Discovery Network*, 507 U.S. 410 (1993), and *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999), is immaterial. App. 19a, 27a. *Metromedia* "controls the outcome" here, the Ninth Circuit declared, App. 27a, because this case, like *Metromedia*, involves commercial signs. "[W]e are bound to follow the Supreme Court precedent most directly on point, ... 'leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Id.* (citing and quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); brackets omitted).

This petition follows.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve A Circuit Conflict On The Precedential Effect, If Any, And Meaning Of *Metromedia* With Respect To First Amendment Constraints On Governmental Regulation Of Commercial Signs.

This Court should grant certiorari to resolve pervasive uncertainty over the meaning and scope of its splintered decision in *Metromedia*, and to clarify that governmental regulation of commercial signs, like governmental regulation of other forms of commercial speech, is subject to underinclusivity analysis under the First Amendment. As the district court noted, the Sign Ordinance at issue here is subject to a "colossal exception" for commercial signs from which the City itself stands to profit, App. 83a (referring to L.A. Mun. Code § 91.101.5)—not to

mention an equally sweeping exception for noncommercial signs, *see* L.A. Mun. Code § 91.6203. By holding that *Metromedia* forecloses Metro Lights' First Amendment challenge as a matter of law, the Ninth Circuit erred, and deepened a festering circuit conflict over the binding effect, if any, and meaning of that case.

As a threshold matter, it is important to underscore a point not disputed in this litigation, because it has been settled for at least a generation: commercial signs, like other forms of advertising, are a form of speech protected by the First Amendment. While some early precedents of this Court suggested that commercial speech is not entitled to First Amendment protection, *see, e.g., Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), this Court decisively repudiated that view in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-70 (1976). Since *Central Hudson*, this Court has applied a balancing test to analyze the constitutionality of governmental restrictions on commercial speech, considering [1] whether the speech is "lawful" and "not ... misleading," [2] whether the asserted governmental interest is "substantial," [3] whether the regulation "directly advances the governmental interest asserted," and [4] "whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 566.

In *Metromedia*, this Court addressed a First Amendment challenge to a San Diego ordinance that generally prohibited both commercial and noncommercial signs throughout the city, but exempted onsite commercial signs. *See* 453 U.S. at 493-94 & nn.1, 2. This Court struck down the entire

ordinance as "unconstitutional on its face" under the First Amendment, *see id.* at 521 & n.26, but was unable to produce a majority opinion. Rather, *Metromedia* spawned no fewer than five separate opinions. A four-Justice plurality (White, J., joined by Stewart, Marshall, and Powell, JJ.) concluded that the ordinance was invalid as applied to noncommercial signs, but valid as applied to offsite commercial signs despite the exemption for onsite commercial signs. *See id.* at 498-521. Justice Brennan, joined by Justice Blackmun, concurred in the judgment invalidating the ordinance, but concluded that the ordinance was invalid as applied to both noncommercial and commercial signs. *See id.* at 521-40. Justice Stevens, Chief Justice Burger, and then-Justice Rehnquist each separately dissented on the ground that the ordinance was valid as applied to both commercial and noncommercial signs. *See id.* at 540-55 (Stevens, J., dissenting in part); *id.* at 555-69 (Burger, C.J., dissenting); *id.* at 569-70 (Rehnquist, J., dissenting). Then-Justice Rehnquist lamented in his dissent that "[i]n a case where city planning commissions and zoning boards must regularly confront constitutional claims of this sort, it is a genuine misfortune to have the Court's treatment of the subject be a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Id.* at 569 (dissenting opinion).

Suffice it to say that this lament proved prophetic, and the lower courts have struggled mightily to determine what lesson, if any, to derive from *Metromedia*. The Third, Sixth, and Eleventh Circuits have responded to this uncertainty by holding that *Metromedia* establishes no binding law at all, because it did not yield a majority opinion or

any ascertainable legal principle. *See, e.g.*, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261 (11th Cir. 2005) ("Because the *Metromedia* plurality's constitutional rationale did not garner the support of a majority, it has no binding application."); *id.* at 1261 n.10 ("[T]here may be situations where [a fractured decision] does not yield any rule to be treated as binding in future cases. *Metromedia* presents just such a case.") (citations omitted); *Rappa v. New Castle County*, 18 F.3d 1043, 1054-61 (3d Cir. 1994) (holding that "*Metromedia* is ... a case" in which "no particular standard constitutes the law of the land, because no single approach can be said to the support of a majority of the Court"); *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991) (noting that "[t]he [*Metromedia*] Court's judgment rested on the ground that San Diego's ordinance was an impermissible content-based restriction on non-commercial speech because it only permitted on-site signs with certain types of speech," and declining to interpret *Metromedia* as establishing binding law with respect to restrictions on commercial speech), *aff'd*, 507 U.S. 410. Indeed, the Third Circuit in *Rappa* proceeded to craft its own First Amendment analysis for sign regulations, starting from first principles—including consideration of underinclusivity. *See* 18 F.3d at 1065; *see also id.* at 1080 (Alito, J., concurring) ("Until the Supreme Court provides further guidance concerning the constitutionality of sign laws, I endorse the test set out in the court's opinion.") (citations omitted).

In sharp contrast, however, other lower courts—including the Fourth, Eighth, Ninth, and Tenth Circuits—have held that *Metromedia* establishes

binding law, and interpret that decision to give governments virtual *carte blanche* to restrict or ban offsite commercial billboards and signs. *See, e.g.*, *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 905 (9th Cir. 2007) ("*Metromedia* allows a city to completely ban off-site commercial billboards."); *Advantage Media, L.L.C. v. City of Eden Prairie*, 456 F.3d 793, 802-03 (8th Cir. 2006) (relying on *Metromedia* to uphold "restrictions on off premises commercial signs"); *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) ("[W]e hold that *Metromedia* continues to control the regulation of billboards."); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 610-11 (9th Cir. 1993) ("*Metromedia* remains the leading decision in the field, holding that a city, consistent with the *Central Hudson* test, may ban all offsite commercial signs."); *National Adver. Co. v. City & County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990) (applying *Metromedia* to reject underinclusivity challenge to commercial billboard regulations); *National Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (holding, based on *Metromedia*, that a city "may prohibit [commercial] billboards entirely in the interests of traffic safety and aesthetics"); *Georgia Outdoor Adver., Inc. v. City of Waynesville*, 833 F.2d 43, 45 (4th Cir. 1987) (relying on *Metromedia* to reject a challenge to a complete ban on commercial billboards); *Major Media of the S.E., Inc. v. City of Raleigh*, 792 F.2d 1269, 1272 (4th Cir. 1986) ("The Supreme Court ... determined in *Metromedia* ... that a city may justifiably prohibit all off-premises signs or billboards for aesthetic and safety reasons.").

The upshot of these dueling lines of cases is that the federal courts of appeals are divided on the threshold question whether *Metromedia* establishes any binding law in the first place. This situation leaves governmental regulators and regulated entities (many of which, like petitioner, operate in multiple circuits) in a fog. The lower courts should not be condemned in perpetuity to trying to figure out what binding law, if any, the fractured *Metromedia* decision establishes. *Compare Solantic*, 410 F.3d at 1261 & n.10 (analyzing *Metromedia* under the analysis set forth in *Marks v. United States*, 430 U.S. 188, 193 (1977), and concluding that it establishes no binding law); *Rappa*, 18 F.3d at 1056-61 (same); *Discovery Network*, 946 F.2d at 470 n.9 (same) *with Lavey v. City of Two Rivers*, 171 F.3d 1110, 1114 n.14 (7th Cir. 1999) (concluding that *Metromedia* establishes binding law because Justice Stevens, although dissenting from the judgment, joined the discussion regarding commercial signs in the plurality opinion); *Outdoor Sys.*, 997 F.2d at 610-12 (same); *Ackerly*, 108 F.3d at 1099 & n.5 (concluding that *Metromedia* establishes binding law because "seven Justices agreed" that the challenged ordinance was not unconstitutionally underinclusive with respect to commercial signs); App. 16-17a n.9 (asserting that "[a] majority of the [*Metromedia*] Court *upheld* the constitutionality of the ban to the extent that it only prohibited commercial advertising") (emphasis added).

With all respect, those courts—like the Ninth Circuit—that have concluded that *Metromedia* establishes binding law regarding commercial signs have over-read that case. When this Court produces a fractured decision, the binding law, if any, is set

forth in "the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment.*" *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (emphasis added) (citing *Marks*, 430 U.S. at 193); *see also Marks*, 430 U.S. at 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.") (emphasis added; internal quotation omitted). Because, as noted above, the judgment in *Metromedia* was to invalidate the challenged ordinance in its entirety, the votes of the dissenting Justices (who would have upheld the ordinance in its entirety) do not establish binding law. That is why, although Justice Stevens joined the plurality's discussion of certain issues, *see* 453 U.S. at 541 (Stevens, J., dissenting in part), there is no opinion for the Court in *Metromedia* either in whole or in part.

In short, under *O'Dell* and *Marks*, the views of the dissenting Justices in *Metromedia* do not give that fractured decision any binding force. That is not to say, of course, that the views of the dissenting Justices in *Metromedia* necessarily lack persuasive force. To the contrary, this Court has looked to the views of the *Metromedia* dissenters in subsequent cases. *See, e.g.*, *Ladue v. Gilleo*, 512 U.S. 43, 49-50 (1994); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984). But those references do not magically imbue the views of the dissenting Justices in *Metromedia* with binding force. To the contrary, the *Ladue* Court confirmed that "the Court's *judgment* in *Metromedia*,

supported by two different lines of reasoning [*i.e.*, the plurality opinion and the opinion of Justice Brennan concurring in the judgment], invalidated the San Diego ordinance in its entirety." 512 U.S. at 49 (emphasis added). At the very least, there is no good reason to allow the circuit conflict on *Metromedia*'s binding effect on the lower courts, if any, to continue to fester.

And this case presents an especially good vehicle for addressing that issue, because the Ninth Circuit not only attributed binding force to the views of the *Metromedia* dissenters, but then proceeded to attribute a remarkably (and untenably) aggressive "holding" to the *Metromedia* "majority." App. 16-17a n.9, 17a, 18a, 21a, 22a, 24a. According to the Ninth Circuit, *Metromedia* rejected not only the argument that San Diego's ban on offsite commercial signs was underinclusive because it exempted onsite commercial signs, but also the argument that San Diego's ban on offsite commercial signs was underinclusive because it exempted twelve other categories of signs (including signs at public transit stops). App. 17a, 20-22a.

The Ninth Circuit acknowledged, with some understatement, that the underinclusivity challenge in *Metromedia* "*focused* on the exclusion of onsite signs," but insisted that "the Court did note the exception for 'other unspecified signs' at the start of its substantive discussion." App. 24a (emphasis added; quoting *Metromedia*, 453 U.S. at 511 (plurality opinion)). "More importantly," the Ninth Circuit then asserted, "nothing in [*Metromedia*'s] analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of

a problem, binds its holding inextricably to the particular onsite-offsite distinction." *Id.* Accordingly, the Ninth Circuit held that *Metromedia* foreclosed Metro Lights' underinclusivity challenge to Los Angeles' Sign Ordinance *as a matter of law*. App. 20-33a; *see also Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 816 (9th Cir. 2003) (holding that, under *Metromedia*, "it should not matter that [a restriction on commercial signs] is underinclusive").

That sweeping interpretation of *Metromedia* is untenable based not only on *Metromedia* itself but also on this Court's subsequent decisions. While it is certainly true that the San Diego ordinance at issue in *Metromedia* included several exemptions beyond the one for onsite commercial signs, *see* 453 U.S. at 495 n.3 (plurality opinion), the plurality opinion never addressed those additional exemptions in assessing whether the ordinance was unconstitutionally underinclusive. To the contrary, the plurality focused its underinclusivity analysis *solely* on the exemption for onsite commercial signs. *See id.* at 510-12 (plurality opinion). Given that the *Metromedia* plurality never addressed the underinclusivity implications of the other exemptions, it cannot be deemed to have resolved the matter one way or another. *See, e.g., Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (same).

And if there were any room for doubt on this score, it should have been dispelled by this Court's subsequent decision in *Discovery Network*. The Court there specifically rejected the argument that *Metromedia* foreclosed underinclusivity challenges in the context of commercial speech. *See Discovery Network*, 507 U.S. at 425 n.20. Rather, the Court explained, a majority of the Justices in *Metromedia* had simply rejected the argument that a general ban on commercial signs was unconstitutionally underinclusive because it exempted onsite commercial signs. *See id.* Nothing in *Metromedia*, the *Discovery Network* Court emphasized, forecloses any and all *other* underinclusivity challenges to restrictions on commercial speech. *See id.* Thus, the *Discovery Network* Court itself proceeded to invalidate a restriction on commercial speech as underinclusive—there, a ban limited to commercial (as opposed to non-commercial) newsracks. *See id.* at 424-31; *see also Greater New Orleans*, 527 U.S. at 190-95 (invalidating a restriction on commercial speech as underinclusive).

Indeed, *Discovery Network* raised the possibility that the *Metromedia* plurality had erred by applying the *Central Hudson* analysis in the first place to a restriction on commercial speech that is not justified by reference to the commercial nature of the speech. "[I]f commercial speech is entitled to 'lesser protection' only when the regulation is aimed at either the content of the speech or the particular adverse effects stemming from that content, it would seem to follow that a regulation that is not so directed should be evaluated under the standards applicable to regulations on fully protected speech, not the more lenient standards by which we judge

regulations on commercial speech." 507 U.S. at 416 n.11. In other words, commercial speech is subject to greater governmental regulation than non-commercial speech only insofar as such regulation relates to the commercial nature of the speech, and not when such regulation has nothing to do with the commercial nature of the speech (*e.g.*, regulations based on safety or aesthetics). *See id.*; *see also id.* at 435-38 (Blackmun, J., concurring); *Discovery Network*, 946 F.2d at 468-72 & n.9, *aff'd*, 507 U.S. 410. While this Court declined to resolve that issue in *Discovery Network*, since the regulations at issue there did not pass First Amendment muster even under *Central Hudson*, *see* 507 U.S. at 416 n.11, *Discovery Network* obviously casts an even greater pall over *Metromedia*'s precedential value.

As noted above, the Ninth Circuit did not even try to deny the "tension" or "inconsistency" between its interpretation of *Metromedia* and this Court's subsequent commercial speech precedents, including *Discovery Network* and *Greater New Orleans*. App. 19a, 27a; *see also Outdoor Sys.*, 997 F.2d at 610 (interpreting *Metromedia* to foreclose an underinclusivity challenge but noting that "we are somewhat uneasy" in light of *Discovery Network*). Instead, the Ninth Circuit simply declared below that its hands were tied by *Metromedia*, which it characterized as "the Supreme Court precedent most directly on point" because it also involved commercial signs. App. 27a. But nothing in *Metromedia* (or logic) suggests that an entirely different First Amendment analysis applies to governmental

regulation of commercial signs than to governmental regulation of other media of commercial speech.[2]

Thus, even assuming that *Metromedia* establishes any binding law at all, it certainly does not establish the proposition that restrictions on commercial signs are immune from underinclusivity analysis under the First Amendment, or that courts must (as the Ninth Circuit declared below) "exude[] deference," App. 24a, to such restrictions. *See, e.g.*, *Lavey*, 171 F.3d at 1114-16 & nn.14, 16 (holding that *Metromedia* established binding law, but interpreting *Metromedia* to require a "fit" between a regulation on commercial signs and a city's safety and aesthetic goals, and thereby entertaining an underinclusivity challenge); *Denver*, 912 F.2d at 408-10 (same). Certainly a restriction on commercial signs should not be subject to judicial deference in Los Angeles, California, *see* App. 24-29a, but not in

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[2] To be sure, the *Metromedia* plurality observed that "[e]ach method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method," and that "[w]e deal here with the law of billboards." 453 U.S. at 501 (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949)). But that observation simply reminds courts to be sensitive to the differences among media in applying generally applicable First Amendment principles; it does not direct courts to apply an entirely different analytical framework to each and every medium. Indeed, the *Metromedia* plurality itself analyzed the sign restrictions at issue there under the very same *Central Hudson* test that this Court later applied in both *Discovery Network* and *Greater New Orleans*. *Compare Metromedia*, 453 U.S. at 507-08 (plurality opinion) *with Discovery Network*, 507 U.S. at 416 & n.11; *Greater New Orleans*, 527 U.S. at 183-84.

Glendale, Ohio, *see, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 774-78 (6th Cir. 2007) (*en banc*).

By holding that *Metromedia* compels the entry of judgment in Los Angeles' favor here as a matter of law, the Ninth Circuit inflated that "fractured, plurality opinion of dubious precedential value," *Tanner Adver. Group, L.L.C. v. Fayette County, Ga.*, 451 F.3d 777, 794 (11th Cir. 2006), beyond all bounds of principle and precedent. Certainly, this Court's other commercial speech cases in the years since *Metromedia* cannot be said to have "exude[d] deference" to governmental restrictions on commercial speech—to the contrary, those decisions have not hesitated to invalidate restrictions lacking the requisite "fit" to the governmental interests at stake. *See, e.g.*, *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371-77 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 561-67 (2001); *Greater New Orleans*, 527 U.S. at 188-95; *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-91 (1995); *Discovery Network*, 507 U.S. at 424-30.

Indeed, it is hard to see how a court could ever perform a meaningful underinclusivity analysis while "exud[ing] deference," App. 24a, to a governmental restriction on speech. The whole point of an underinclusivity challenge is to test the validity of the lines drawn by a speech regulator. To test those lines while at the same time "exud[ing] deference" to those very same lines is a contradiction in terms. *See* App. 19a (acknowledging that "the deference *Metromedia* shows may seem to be in some tension with other underinclusivity cases such as *Discovery Network and Greater New Orleans*").

In sum, the decision below deepened a circuit conflict on whether *Metromedia* establishes any binding law at all, gave that decision an extraordinarily aggressive reading that places it on a collision course with this Court's other commercial speech precedents, and then concluded by declaring that only this Court can clean up the mess. App. 27a ("*Metromedia* ... controls the outcome" of this case, and "we are bound to follow the Supreme Court precedent most directly on point.") (citing *Rodriguez de Quijas*, 490 U.S. at 484). If ever there were a red flag that the time has come for this Court to revisit one of its precedents, this is it.

This Court can and should now revisit *Metromedia* to resolve the confusion that its splintered decision in that case has spawned over the past generation. *See, e.g.*, *Rappa*, 18 F.3d at 1061 n.28 (Becker, C.J., joined by Alito, J.) (expressing the "hope" that this Court will "clarify and rectify the problems created by its splintered opinion in *Metromedia*"); Jason R. Burt, *Speech Interests Inherent in the Location of Billboards and Signs: A Method for Unweaving the Tangled Web of* Metromedia, Inc. v. City of San Diego, 2006 B.Y.U. L. Rev. 473, 475 (2006) (noting that *Metromedia* "produced no majority opinion and consisted of five separate opinions that each suggested different lines of reasoning," thereby leaving "courts and governments seeking a clear rule to apply to billboard regulations [to] face a difficult constitutional quandary"); M. Ryan Calo, Note, *Scylla or Charybdis: Navigating the Jurisprudence of Visual Clutter*, 103 Mich. L. Rev. 1877, 1878 (2005) (noting that "[t]he jurisprudence of visual clutter is in a state of disarray," and that "[t]he synergy of

Metromedia and *Discovery Network* yields a dangerous path for any government actor seeking to reduce, but not completely eliminate, outdoor signs").

II. Los Angeles' Selective And Underinclusive Ban On Commercial Signs Violates The First Amendment.

Had the Ninth Circuit actually grappled with Metro Lights' First Amendment challenge to the Los Angeles Sign Ordinance at issue here, rather than holding that *Metromedia* forecloses that challenge as a matter of law, it would have been constrained to affirm the district court's judgment sustaining that challenge. As noted above, the Ordinance purports to be based on traffic safety and aesthetic concerns. *See* L.A. Mun. Code § 91.6201.2. But the Ordinance carves out a "colossal exception" that undercuts its constitutionality, App. 83a: it does not apply to the Street Furniture from which Los Angeles derives substantial revenues, *see* L.A. Mun. Code § 91.101.5, or for that matter to noncommercial signs, *see* L.A. Mun. Code § 91.6203.

Accordingly, the district court had little difficulty holding that the Ordinance violates the First Amendment. App. 68-85a. The Street Furniture program, as the court explained, undermines Los Angeles' asserted interest in traffic safety "since many of the Street Furniture advertisements, which are placed at street level, are designed precisely to attract the attention of all who pass by, including those driving automobiles whose attention would be better directed toward the operation of their motor vehicles." App. 69a; *see also id.* ("[T]he Street Furniture Program cannot be squared with the Sign Ordinance's stated purpose of promoting traffic

safety."). Thus, the court concluded that "the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in traffic safety," App. 76a, much less in a narrowly tailored way, App. 82-84a.

Similarly, the district court held that the Street Furniture program undermines the City's asserted interest in aesthetics because "[t]he Sign Ordinance purports to protect the visual environment by eliminating all off-site signs from the City's public rights of way, while the Street Furniture Program simultaneously authorizes thousands of such signs to be posted throughout the City by [CBS]." App. 78a; *see also* App. 79a. ("[W]hat the City, through its Sign Ordinance, takes away from most commercial enterprises (for the stated purpose of protecting the visual environment), the City grants back to a single advertiser under the Street Furniture Program thereby perpetuating, rather than eliminating, off-site signage throughout the City."). Indeed, Metro Lights "present[ed] graphic evidence of this point in a photograph which compares a Metro Lights sign with a City bus shelter sign with exactly the same dimensions and the same advertising copy." App. 78-79a (citing photographs reprinted at App. 91-92a). "Though the signs themselves are indistinguishable, one sign falls within the ban while the other does not." App. 79a. The court thus concluded that "the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in protecting the City's visual environment," App. 80a, much less in a narrowly tailored way, App. 82-84a.

At the end of the day, as the district court recognized, "'the operation of ... [the] regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.'" App. 72a (quoting *Greater New Orleans*, 527 U.S. at 190). "[T]he City's agreement with [CBS] tends to negate the very benefits—traffic safety and protection of the visual environment—that the Ordinance was designed to promote." App. 41a; *see also id.* (holding that the City cannot "use *Central Hudson* as a shield to defeat constitutional challenges to its Sign Ordinance while collecting revenue from a different media company engaged in conduct that appears, on its face, to violate the express terms and purposes of the Ordinance").

Notwithstanding the Ninth Circuit's suggestion to the contrary, the application of an underinclusivity analysis to billboard and sign regulations would in no way undermine the "deference" to which local governments are due on matters of traffic safety and aesthetics. Local governments are free to define their own safety and aesthetic interests. When they invoke those interests to justify a restriction on commercial speech, however, they must at a minimum be able to show that the restriction "directly advances" those interests, and "is not more extensive than is necessary" to serve those interests. *Central Hudson*, 447 U.S. at 566. Restrictions on speech that merely have "some impact" on the problem the government seeks to address do not satisfy this standard, *Greater New Orleans*, 527 U.S. at 189, especially where (as here) the government itself provides "simultaneous encouragement," *id.*, to those very problems.

In short, where a selective ban on commercial speech is grossly underinclusive, there is reason to be suspicious of the ban—especially where, as here, the government itself stands to profit financially by creating a valuable monopoly on commercial speech. The government cannot restrict speech in order to raise money, or abridge the First Amendment rights of some to enhance the value of others. Thus, while a city can certainly impose neutral and reasonable time, place, and manner restrictions on commercial signs, like other forms of speech (and indeed Los Angeles itself imposed just such restrictions until 2002), it cannot impose a selective and underinclusive ban on commercial speech. Indeed, as *Discovery Network* suggests, it is far from clear that restrictions on commercial speech are entitled to any greater deference than restrictions on noncommercial speech where, as here, they are justified not by reference to the commercial nature of the speech but instead by reference to other governmental interests like traffic safety and aesthetics. *See* 507 U.S. at 416 n.11.

"Deference," in other words, is not a code word for abdicating the judicial role in protecting free speech. *See, e.g.*, *Pagan*, 492 F.3d at 774-78 (rejecting city's argument, based on *Metromedia*, that court should uphold restriction on commercial speech by "defer[ring] to legislative judgments on matters of traffic safety and aesthetics"). Again, this point is hardly novel: it is the key lesson of such cases as *Discovery Network* 507 U.S. at 424-28, and *Greater New Orleans*, 527 U.S. at 188-95. The Ninth Circuit erred by refusing to apply that lesson here, and instead holding that *Metromedia* effectively carves out a "sign exception" to the First Amendment.

Neither that holding nor the Sign Ordinance at issue here should be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
LAURA ALEXANDER
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

August 31, 2009

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METRO LIGHTS, L.L.C., a New York limited liability company, *Plaintiff-Appellee,* v. CITY OF LOS ANGELES, a California municipal corporation, *Defendant-Appellant*	No. 07-55179 D.C. No. CV-04-01037-GAF (Ex)
METRO LIGHTS, L.L.C., a New York limited liability company, *Plaintiff-Appellant,* v. CITY OF LOS ANGELES, a California municipal corporation, *Defendant-Appellee*	No. 07-55207 D.C. No. CV-04-01037-GAF OPINION

Appeal from the United States District Court
for the Central District of California
Gary A. Feess, District Judge, Presiding

Argued and Submitted
June 4, 2008 - Pasadena, California

Filed January 6, 2009

Before: David R. Thompson,
Diarmuid F. O'Scannlain, and
Richard C. Tallman, Circuit Judges.

Opinion by Judge O'Scannlain

COUNSEL

Kenneth T. Fong, Deputy City Attorney for the City of Los Angeles, California, argued the case for the defendant-appellant and cross-appellee and filed the briefs; Rockard Delgadillo, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, and Jeri L. Burge, Assistant City Attorney, Los Angeles, California, were on the briefs.

Laura W. Brill, Attorney for Amici Curiae CBS-Decaux LLC and California League of Cities, Irell & Manella LLP, Los Angeles, California, also argued the cause for the defendant-appellant and cross-appellee and filed briefs.

Laurence H. Tribe, Attorney, Cambridge, Massachusetts, argued the cause for the plaintiff-appellee and cross-appellant; Paul E. Fisher, Attorney, Newport Beach, California, filed the briefs; Eric V. Rowen, Scott D. Bertzyk, and Karin L. Bohmholdt, Attorneys, Greenberg Traurig LLP, Santa Monica, California, were on the briefs.

OPINION

O'SCANNLAIN, Circuit Judge:

We must determine whether a city violates the First Amendment by prohibiting most offsite commercial advertising while simultaneously contracting with a private party to permit sale of such advertising at city-owned transit stops.

I

This case lies at the crossroads of two courses of action that the City of Los Angeles has followed. First, in December 2001, the City entered into a contract with Viacom Decaux LLC, later to become CBS-Decaux LLC ("CBS"), under which CBS would install public facilities at city-owned transit stops across the city in exchange for exclusive advertising rights on those facilities. Five months later, the City enacted an ordinance ("the Sign Ordinance") generally banning offsite advertising[1] but excluding from its reach, among other places, such transit stops. Los Angeles Municipal Code ("L.A.M.C.") §§ 91.101.4, 91.101.5, 91.6205.11.

A

Since 1987, the City has engaged in an almost unbroken chain of agreements with private contractors in which the City granted the exclusive right to advertise on transit shelters in exchange for the installation of such facilities and annual payments. The first contract provided for the "exclusive right to display advertising materials on [transit] shelters" in exchange for the installation of 2,500 shelters, as well as annual payments of the greater of either a percentage of gross advertising receipts or a lump sum.

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[1] As discussed in greater detail *infra*, offsite advertising, or offsite sign-age, refers to a sign on private property advertising commercial services or wares purveyed elsewhere than on the premises where the sign is located.

In May 1999, after the first contract had expired, the City entered into the Norman Bus Bench Franchise agreement, modeled after its predecessor. The City gave Norman, the franchisee, the exclusive right to place commercial advertising on bus stop benches in the City, in exchange for the installation and maintenance of 6,000 to 8,770 benches, a similar fee structure, and a commitment to place public service announcements on them.

The City decided to deviate from the model somewhat in late 2001. It would supersede the Norman Contract by means of a new form of agreement, which would require a franchisee to install not only new bus stop benches, but also other public facilities such as shelters at bus stops, automated self-cleaning public toilets, trash receptacles, public amenity kiosks, and news racks. Otherwise, the new contract would be identical to the Norman Contract. The City initiated an open bidding process, stating that its objectives included: (1) the use of one contractor to establish a single point of accountability; (2) the significant upgrade of "the appearance and quality of street furniture on Los Angeles City streets"; and (3) the improvement of the "visual character of the streetscape," particularly by "reduc[ing] physical and visual clutter on sidewalks" and ensuring that "[t]he streets of the City are [not] littered with various street elements that are situated in unplanned ways ... creating general chaotic visual impacts on the street." While the new contract provided for exclusive advertising rights on the new public facilities, it said nothing about municipal regulation of offsite signs.

CBS (then known as Viacom Decaux LLC), was the successful bidder and, on December 21, 2001, entered into a twenty-year contract with the City. Under the terms of that contract, called the Street Furniture Agreement ("the SFA"), first Viacom Decaux, and then CBS, agreed to install the new public facilities and to make annual payments according to a formula similar to those the City had used in its earlier deals. The bus stop shelters and other facilities would remain City property, and the City would retain control over much of the design of the installed street furniture.

B

On April 30, 2002, the Los Angeles City Council adopted its Sign Ordinance, which listed six purposes, mostly connected to traffic safety and aesthetics.[2] Essentially, the new law, which amended L.A.M.C. § 91.6205.11, provided that "[s]igns are prohibited if they ... [a]re off-site signs, except when off-site signs are specifically permitted pursuant to a

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[2] Those purposes are: (1) ensuring "[t]hat the design, construction, installation, repair and maintenance of signs will not interfere with traffic safety or otherwise endanger public safety;" (2) providing "reasonable protection to the visual environment while providing adequate conditions for meeting sign users['] needs;" (3) reducing "incompatibility between signs and their surroundings;" (4) providing "the public and sign users" with "signs having improved legibility, readability and visibility;" (5) "equalizing the opportunity for messages to be displayed;" and (6) providing that "adequacy of message opportunity will be available to sign users without dominating the visual appearance of the area." L.A.M.C. § 91.6201.2

variance, legally adopted specific plan, supplemental use district or an approved development agreement. This shall also apply to alterations or enlargements of legally existing off-site signs." The L.A.M.C. defines "Off-Site Sign" as "[a] sign which displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message, which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where such sign is located." L.A.M.C. § 91.6203. The prototypical offsite sign, it seems, is the common billboard, whether freestanding or affixed to a building or other structure. The exhibits in the record show, however, that posters set in glass cases that are then affixed to structures also count as offsite signs.

The ban applies exclusively to commercial signs. *Id.*[3] In addition, under L.A.M.C. §§ 91.101.4, 91.101.5, the City's Building Code (of which the ban is a part) does not apply to "work located primarily in a public way," such as public transit shelters and other facilities. The Sign Ordinance did not alter or amend this additional exemption.[4]

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[3] Metro Lights argues that "the City completely prohibits off-site signs regardless of whether they convey commercial or non-commercial speech," but our precedent forecloses such claim. *See Clear Channel Outdoor Inc. v. City of L.A.*, 340 F.3d 810, 815 (9th Cir. 2003) ("In effect, [L.A.M.C. § 91.6203] creates an exemption for noncommercial off-site signs.").

[4] The City earnestly argues that this is not really an exemption but simply the non-application of the statute to the public way.

At the time the Sign Ordinance became effective, there were approximately 18,500 transit stops in the City.

C

Metro Lights, LLC, ("Metro Lights") owns and operates outdoor signs in a variety of markets, including Los Angeles. Around December 2003, the City issued Metro Lights numerous citations for violating the Sign Ordinance by installing new offsite signs. In response, Metro Lights brought this suit, seeking declaratory and injunctive relief, as well as damages, pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 & 2202. The City moved to dismiss, while Metro Lights moved for a preliminary injunction to enjoin the City from enforcing the Sign Ordinance as to twenty specified signs. The district court granted the City's motion in part, dismissing several but not all of the First Amendment claims, but also granted Metro Lights's motion for a preliminary injunction.

Metro Lights responded by filing its second amended complaint, which also raised various First Amendment claims under § 1983. Metro Lights ultimately moved for partial summary judgment on its First Amendment claims, arguing that the SFA undermined the City's purported grounds for enacting the Sign Ordinance. After the district court had held a hearing but before it had ruled on Metro Lights's motion, the City filed its own motion for partial summary judgment on the same

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We fail to see any difference sufficient to change our analysis and so we did not opt for one label over the other.

constitutional claims, arguing that the Sign Ordinance was constitutional in light of the City's interests in promoting aesthetics and traffic safety.

On August 11, 2006, the district court entered its final order granting Metro Lights' motion for partial summary judgment on the merits of its First Amendment claim. According to the district court, "[t]he City cannot, on the one hand, preclude Plaintiff from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles."

After this defeat, the City filed a motion for summary judgment asserting that Metro Lights was not entitled to damages. This time the City met with some success, as the district court granted the motion and denied Metro Lights an award of damages.

Judgment was entered on January 23, 2007.[5] The City timely appealed from the grant of summary judgment as to the First Amendment claims, and Metro Lights timely cross-appealed from the grant of summary judgment denying its claim for damages.

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[5] The district court's order also granted the City's claim for summary judgment as to an equal protection claim Metro Lights made, a disposition the parties have not appealed.

II

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." It applies to state and local governments, such as the City of Los Angeles, through the Fourteenth Amendment's Due Process Clause. *Near v. State of Minn.*, 283 U.S. 697, 707 (1931). However, "[e]ven a cursory reading" of the Supreme Court's opinions in this area of the law "reveals that at times First Amendment values must yield to other societal interests." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981). *See also Members of City Council of City of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("It has been clear since [the Supreme] Court's earliest decisions concerning the freedom of speech that the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest."). Furthermore, "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562-63 (1980) (internal citation omitted).

In *Central Hudson*, the Supreme Court announced a four-part test for assessing the constitutionality of a restriction on commercial speech: (1) if "the communication is neither misleading nor related to unlawful activity," then it merits First Amendment scrutiny as a threshold

matter; in order for the restriction to withstand such scrutiny, (2) "[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech;" (3) "the restriction must directly advance the state interest involved;" and (4) it must not be "more extensive than is necessary to serve that interest." *Id.* at 564-66; *see Clear Channel Outdoor, Inc.*, 340 F.3d at 815. No one argues that this test should not apply here;[6] since we are dealing with a regulation on commercial speech, *Central Hudson* plainly controls.

A

The parties do not dispute that the offsite advertising at issue in this case merits First Amendment protection because it is neither misleading nor related to unlawful activity.[7] Nor is

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[6] Metro Lights briefly argues that the district court erred in applying *Central Hudson* because the regulation in this case purportedly is content-based. However, whether or not the City's regulation is content-based, the *Central Hudson* test still applies because of the reduced protection given to commercial speech. *See Ballen v. City of Redmond*, 466 F.3d 736, 743-44 (9th Cir. 2006). Metro Lights cited a number of cases in support of its argument, but none of them concerned regulation of commercial speech, and hence did not discuss the applicability of *Central Hudson*.

[7] We note that the district court's analysis confused this part of the test, though the court came to the correct conclusion as to this point. It relied in part on the observation that "[a]dvertising is undisputably a lawful activity." That is not the point, since not all advertisements receive First Amendment protection. *Central Hudson* asks if the commercial speech is "related to unlawful activity." 447 U.S. at 564. Thus, in the

there any serious contention that the City has not asserted a substantial interest. It is well-established that traffic safety and aesthetics constitute substantial government interests. *See Metromedia*, 453 U.S. 507-08. The L.A.M.C., indeed, stresses the City's interests in traffic safety and aesthetics several times, as did the City's proposal for bids for the SFA. *Central Hudson* requires at most that the City "assert a substantial interest," 447 U.S. at 564; such references constitute just such an assertion. Recognizing the straightforwardness of such result, the parties have focused their argument, and we therefore focus our analysis, upon the third and fourth elements of the *Central Hudson* test. That is, we ask whether the City's restriction "directly advances" the government interest and whether the City's restriction is narrowly tailored to its aim.

B

The Supreme Court has said that "[t]he last two steps of the *Central Hudson* analysis basically involve a consideration of the 'fit' between the legislature's ends and the means chosen to accomplish those ends." *United States v. Edge* Broadcasting *Co.*, 509 U.S. 418, 427-28 (1993) (internal quotation marks omitted). It has not always been clear how this basic inquiry differs with respect to the last two steps of the *Central Hudson* analysis, and indeed the Supreme Court has observed that the steps of the analysis are "not

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context of advertising, one must ask whether the goods or services the party advertises are illegal.

entirely discrete." *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999). But several important threads specific to each step bear a closer look.

1

When one asks (referring to *Central Hudson's* third element) whether a "regulation directly advances the governmental interest asserted[,] ... [i]t is readily apparent that this question cannot be answered by limiting the inquiry to whether the governmental interest is directly advanced as applied to a single person or entity." *Edge Broadcasting*, 509 U.S. at 427 (internal quotation marks omitted). Thus, we must look at whether the City's ban advances its interest in its general application, not specifically with respect to Metro Lights.

Another consideration in the direct advancement inquiry is "underinclusivity," which Metro Lights has made the centerpiece of its First Amendment challenge on appeal. Though it may seem counter-intuitive at first, the Supreme Court has held that a regulation can be unconstitutional if it "in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages [or because] [t]hey may diminish the credibility of the government's rationale for restricting speech in the first place." *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51, 52 (1994). To put it in the context of the *Central Hudson* test, a regulation may have exceptions that "undermine and counteract" the interest the government claims it adopted the law to further; such a regulation cannot "directly and materially

advance its aim."[8] *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995) (striking down a federal law prohibiting labels on beer products from showing alcohol content but permitting beer advertisements from containing such information and permitting such information on wine and spirits).

The Supreme Court has struck down several arrangements at least in part because they were unconstitutionally underinclusive. In one case, an advertising magazine sued the City of Cincinnati because it prohibited, in the interest of aesthetics and sidewalk safety, the distribution of commercial handbills in newsracks but permitted the distribution of non-commercial handbills. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993). The Court held that "the distinction [between commercial and non-commercial

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[8] It is not always clear to which element of *Central Hudson* an underinclusivity analysis relates. In *Valley Broadcasting Co. v. United States*, for instance, we struck down an underinlusive regulation because it did not directly advance the government's interest, the requirement of the third element of *Central Hudson*. 107 F.3d 1328, 1333-36 (9th Cir. 1997). We have also had occasion, however, to analyze a regulation for unconstitutional underinclusivity under the narrow tailoring requirement of *Central Hudson*—the fourth element. *See Ballen*, 466 F.3d at 742-44. One might reconcile these cases by noting that in *Valley Broadcasting* the underinclusivity simply undermined the statute's ability to advance the government's interest, 107 F.3d at 1334, whereas in *Ballen* it reflected a content-based discrimination in speech, 466 F.3d at 743-44. By discriminating on the basis of content, the statute that *Ballen* struck down was "more extensive than necessary" to advance the government's interest. *Central Hudson*, 447 U.S. at 566.

publications] bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424 (emphasis in original). The decision made it clear that, absent "some basis for distinguishing between [non-commercial] newspapers and commercial handbills that is relevant to an interest asserted by the city," Cincinnati could not rely on either the lower value of commercial speech for First Amendment purposes or the mere fact that by banning one kind of newsrack it was advancing its interest because, of course, there would be fewer newsracks. *Id.* at 428, 426-27 (internal quotation marks omitted). In other words, *Central Hudson* requires a logical connection between the interest a law limiting commercial speech advances and the exceptions a law makes to its own application.

In *Greater New Orleans*, a case Metro Lights cites repeatedly, the Supreme Court further clarified the meaning of unconstitutional underinclusivity. Building on prior cases, especially *Rubin*, 514 U.S. 476, the Court struck down a federal law which banned broadcast advertising for most private casinos but exempted, among others, advertising for Indian tribal casinos. 527 U.S. at 195-96. The Court found that "there was little chance that the speech restriction could have directly and materially advanced its aim"—"minimizing casino gambling and its social costs"—because its exemptions defeated its purpose. *Id.* at 193 (internal quotation marks omitted). It seems to us crucial to the Court's conclusion in *Greater New Orleans* that forbidding one type of advertising but not another "would merely channel gamblers to one casino rather than another." *Id.* at 189. Since the government had

failed to convince the Court that tribal casino gambling was any less problematic than private casino gambling, such mere redistribution of gamblers was a fatal inefficacy.

Thus, under Supreme Court precedent, regulations are unconstitutionally underinclusive when they contain exceptions that bar one source of a given harm while specifically exempting another in at least two situations. First, if the exception "ensures that the [regulation] will fail to achieve [its] end," it does not "materially advance its aim." *Rubin*, 514 U.S. at 489. This is the lesson of *Greater New Orleans*: self-defeating speech restrictions will violate the First Amendment. *See Greater New Orleans*, 527 U.S. at 190 ("The operation of [the regulation] ... is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it."). Second, exceptions that make distinctions among different kinds of speech must relate to the interest the government seeks to advance. *Discovery Network*, 507 U.S. at 418-19 (also noting the "minimal impact" the regulation would achieve as a result of the exception).

2

As to narrow tailoring, the fourth element of the *Central Hudson* test requires that the challenged regulation not be "more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The Supreme Court has clarified that this requirement does not demand that the government use the least restrictive means to further its ends. Rather,

> what [precedent] require[s] is a fit between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.

Bd. of Trustees of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (internal quotation marks and citation omitted).

III

As we now turn to the application of *Central Hudson* to the case before us, we are faced with a difficult threshold question. For the City argues that a more recent Supreme Court decision, *Metromedia, Inc. v. City of San Diego, 453 U.S. 490*, controls the result. In *Metromedia*, the Supreme Court, applying *Central Hudson*, upheld a law similar to the City's insofar as it regulated commercial speech.

A

Much like the Sign Ordinance in this case, the City of San Diego law at issue in *Metromedia* banned commercial offsite signs, but not onsite signs.[9]

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[9] The law also banned noncommercial signage, but the Court distinguished the commercial and noncommercial applications of the law for purposes of its analysis. *See Metromedia*, 453

Specifically, San Diego prohibited "[a]ny sign which advertises or otherwise directs attention to a product, service or activity ... produced or offered elsewhere than on the premises where such sign is located." 453 U.S. at 493 n.1. In addition to leaving onsite signs untouched, the ordinance created twelve exemptions for certain offsite signs, including "government signs" and "signs located at public bus stops." *Id.* at 494, 495 n.3.

The *Metromedia* Court began by limiting its holding to billboard advertising. *Id.* at 501 ("Each method of communicating ideas is a law unto itself and that law must reflect the differing natures, values, abuses and dangers of each method. We deal here with the law of billboards." (internal quotation marks and footnote omitted)). Because we too, deal with a law regulating billboards, at least in significant part, *Metromedia* applies to this case as an initial matter, whether or not it dictates the final result.

The Court then applied *Central Hudson*. *Id.* at 507. San Diego, much like Los Angeles does now, argued that the ban furthered its interests in

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U.S. at 506-07. A majority of the Court upheld the constitutionality of the ban to the extent that it only prohibited commercial advertising, but a plurality ultimately overturned the ordinance because its reach included "signs carrying noncommercial advertising," such that the "ordinance reaches too far into the realm of protected speech," *Id.* at 512-521. As noted, we have held that the Los Angeles Sign Ordinance only prohibits commercial offsite signs. *See Clear Channel Outdoor Inc.*, 340 F.3d at 815.

enhancing "traffic safety and the appearance of the city." *Id.* Just as we do in this case, the Court quickly concluded that the advertising in question was not illegal or misleading and that the City's proffered interests were substantial. *Id.* Indeed, the Court also dismissed the fourth *Central Hudson* element (narrow tailoring), summarily holding that San Diego's ordinance was no broader than necessary. *Id.* at 508 ("If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them."). We shall return to narrow tailoring in more detail below.

"The more serious question," the Court thought, "concerns the third of the *Central Hudson* criteria: Does the ordinance 'directly advance' governmental interests in traffic safety and in the appearance of the city?" *Id.* In other words, was the ordinance underinclusive? The Court first recognized "the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety," *Id.* at 509, and that "billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" *Id.* at 510.

Most importantly, the Court rejected the argument that San Diego "denigrates its interest in traffic safety and beauty and defeats its own case by permitting onsite advertising and other specified signs." *Id.* at 510-11. The Court based its rejection of this underinclusivity argument on three grounds. First, the law's non-application to onsite advertising,

the Court noted, did not alter the direct relation between the city's goals and the ban's application to most offsite advertising. *Id.* at 511. In other words, a ban on some offsite signs still advances traffic safety and aesthetics more than a ban on none.[10] Second, the Court accepted the reasonableness of the supposition that "offsite advertising, with its periodically changing content, presents a more acute problem than does onsite advertising." *Id.* Finally, the Court observed, "San Diego has obviously chosen to value one kind of commercial speech—onsite advertising—more than another kind of commercial speech—offsite advertising." *Id.* at 512. In a statement of deference most relevant to this case, the Court insisted that "[t]he ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance ... its interests should yield. We do not reject that judgment." *Id.*

Though the deference *Metromedia* shows may seem to be in some tension with other underinclusivity cases such as *Discovery Network and Greater New Orleans*, the Supreme Court has reaffirmed *Metromedia* in numerous contexts since the decision. In *Taxpayers for Vincent*, the Court approvingly reviewed *Metromedia*'s conclusion that

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[10] As indicated by the discussion *supra*, at [App. 13-15a], this reason, standing alone, does not appear sufficient to overcome a First Amendment challenge. *Discovery Network*, 507 U.S. at 426-27.

cities have a valid interest in regulating the "visual evil" of billboards. 466 U.S. at 808 n.27. *Taxpayers* relied in part on *Metromedia*'s rejection of "the argument that a prohibition against the use of unattractive signs cannot be justified on esthetic grounds if it fails to apply to all equally unattractive signs *wherever they might be located*." *Id.* at 810 (emphasis added). The Court also recognized the continuing vitality of *Metromedia* in *City of Ladue v. Gilleo*, 512 U.S. 43, when it cited the earlier opinion as bedrock for its analysis of a law restricting signs on residential property. *Id.* at 49.

B

The ordinance considered in *Metromedia* is virtually identical to the ordinance before us now—a total ban on offsite signs, with an exception for shelters at transit stops among other exceptions, enacted to promote traffic safety and aesthetics. Furthermore, *Metromedia* explicitly addressed an underinclusivity challenge. Nevertheless, Metro Lights argues that *Metromedia* does not control this case.

1

Metro Lights argues that we are not bound by *Metromedia* for two reasons. First, it points out that "although the upheld city ordinance [in *Metromedia*] exempted bus benches, the topic of bus benches was not substantively discussed or considered" in the decision. Second, and more importantly, Metro Lights argues that the SFA, as an exception to the application of the Sign Ordinance, violates *Central Hudson*.

a

Metro Lights focuses more on the reasoning than the holding of *Metromedia*. For Metro Lights does not dispute, as it cannot, that *Metromedia* upheld a ban on offsite commercial advertising that included an exception for bus stop benches. Metro Lights insists however, that the exception was insignificant to the Court's holding, because the bus stop bench and other exceptions that the Court considered in *Metromedia* were *de minimis*, unlike the public transit exemption that Los Angeles has carved out of its Sign Ordinance. Indeed, counsel for Metro Lights at oral argument contended that the bus bench exception in *Metromedia* only came to the Supreme Court's attention because counsel for *Metromedia* described it as so minimal that it could not save San Diego's law from being a total prohibition on offsite advertising.

This proffered distinction fails to convince us in light of what *Metromedia* actually says. The Court expressly mentioned the twelve exceptions to San Diego's offsite sign ban. *Metromedia*, 453 U.S. at 495 n.3 (including in the list of exceptions "[a]ny sign erected and maintained pursuant to and in discharge of any governmental function" and "[b]ench signs located at designated public transit bus stops"). *Metromedia*'s reasoning confirms that the Court was well aware of the exceptions to the law and conscious that, in approving the San Diego ordinance's commercial application, it was approving those exceptions too. Indeed, the Court held the statute unconstitutional with respect to its noncommercial application in part *because* of its exceptions. *Id.* at

512-16. Responding to Chief Justice Burger's dissent, the plurality commented that "the Chief Justice ... misunderstands the significance of the city's extensive exceptions to its billboard prohibition." *Id.* at 520. It was, indeed, the Chief Justice, not the plurality, who suggested "that the favored categories [were] for some reason *de minimis* in a constitutional sense." *Id.* at 519. By negative implication, the majority seems to have taken the opposite position.

It is true that this second portion of the majority's argument does not mention the bus stop bench exception by name, but focuses instead on other exceptions. *See id.* (mentioning the exceptions for onsite commercial advertising and temporary political campaign advertising). But even though it is unclear whether the bus stop bench exception was foremost in the mind of the *Metromedia* Court, that hardly justifies us in ignoring its presence in the statute which, in relevant part, the Court upheld. In any event, except for counsel's reference at oral argument, Metro Lights provides no support for its argument that "the bus shelter and other exceptions" considered in *Metromedia* were "*de minimis*," or that they were significantly different in scope than the exemption in this case. Thus we must conclude that *Metromedia* is essentially indistinguishable from this case insofar as the challenged ordinances, in their commercial applications, are concerned.

b

Metro Lights also points to the SFA to distinguish this case from *Metromedia*. Indeed, its counsel, at oral argument, conceded that *Metromedia* "probably

would" control without the SFA.[11] The district court, too, concluded that the Sign Ordinance, standing alone, would satisfy the *Central Hudson* test. According to Metro Lights, however, the advertising permitted under the SFA is equally dangerous—and arguably more so—than the advertising banned under the Sign Ordinance and therefore the ordinance cannot "directly advance" the City's interests in traffic safety and aesthetics. Metro Lights essentially contends, in other words, that the SFA so warps the regulatory scheme of the Sign Ordinance that it makes it more like the underinclusive statute the Supreme Court struck down in Greater New Orleans (and similar cases) than the San Diego ordinance upheld in *Metromedia*. Although we do find the SFA a troubling companion to the Sign Ordinance, we must nonetheless conclude that it does not break the grip of *Metromedia* over this case.[12]

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[11] Counsel also did add that *Metromedia* would only control "if [the Sign Ordinance] was a ban on all offsite commercial signs," that is, without an exception for public transit facilities. But as we explained *supra*, this caveat does not hold water because the law at issue in *Metromedia* itself contained such an exception.

[12] Incidentally, we note a weakness inherent in Metro Lights' reliance on the SFA as a distinction between this case and *Metromedia*, a distinction the City never pointed out. For *Metromedia* teaches that a municipality may constitutionally bar offsite advertising with an exception for public transit stops. It would be strange, then, if the prohibition suddenly violated the Constitution because the municipality made use of such an exception. But that is what Metro Lights urges us to hold, since the SFA grants CBS the right to sell advertising

The Court in *Metromedia* squarely faced an underinclusivity challenge to San Diego's law and rejected it. It is true that such challenge focused on the exclusion of onsite signs rather than the exclusion of signs at public transit stops. However, the Court did note the exception for "other specified signs" at the start of its substantive discussion. More importantly, nothing in its analysis, which exudes deference for a municipality's reasonably graduated response to different aspects of a problem, binds its holding inextricably to the particular onsite-offsite distinction.

This becomes apparent once one reconsiders the three main reasons the Court gave for its decision in *Metromedia*. *See id.* at 511-512; *see also supra* at [App. 18-19a]. First, just like in *Metromedia*, the specific exception in question here does not weaken the direct link between the City's objectives and its general prohibition of offsite advertising. Metro Lights, as did the district court, points to a photograph that shows two offsite signs, one on a bus shelter and one on an adjacent building. They are the same size and bear the same advertisement. According to Metro Lights, this literally illustrates how the SFA undermines the City's objectives. But in fact it illustrates quite the opposite. Without the Sign Ordinance, there are two signs; with it, there

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where the Sign Ordinance did not apply in the first place—transit stops. How can it be constitutional to make an exception to a law, but unconstitutional for the exception to operate in practice? Metro Lights makes its argument without facing this uncomfortable question.

would be only one. Thus the Sign Ordinance would halve the clutter on the street shown in the photograph.

Second, the *Metromedia* Court accepted that offsite advertising "present[ed] a more acute problem than does onsite advertising" simply because of the former's "periodically changing content." *Metromedia*, 453 U.S. at 511. Here, Los Angeles essentially argues that the proliferation of offsite advertising by numerous and disparate private parties creates more distracting ugliness than a single, controlled series of advertisements on city property over which the City wields contractual supervision. If periodically changing content was sufficient for San Diego to disfavor offsite signs in general, then we must accept that uncontrolled and incoherent proliferation is sufficient for Los Angeles to disfavor offsite signs away from transit stops.

Finally, and most importantly, *Metromedia*'s third rationale, with its emphasis on deference to legislative judgment, resounds quite clearly in this case. Los Angeles, just like San Diego, "has obviously chosen to value one kind of commercial speech"—controlled offsite advertising on public transit facilities—"more than another kind of commercial speech"—uncontrolled offsite advertising spread willy-nilly about the streets. *Id.* at 512. Just as in *Metromedia*, "[t]he ordinance reflects a decision by the city that the former interest, but not the latter, is stronger than the city's interests in traffic safety and esthetics. The city has decided that in a limited instance ... its interests should yield." *Id.* As the district court noted, the City has been

compensated handsomely for this classically legislative decision, not only in money but in the installation of presumably more attractive public transit facilities and in a veto over the design of advertisements that appear at those facilities. The *Metromedia* Court declined to overrule such a legislative judgment, *id.*, and so do we.

To apply the *Metromedia* analysis to the Sign Ordinance before us today is also to understand why Metro Lights' attempt to cast this case in the mold of *Greater New Orleans* and other underinclusivity cases fails. There, the Court found the ban on broadcast advertising of private casinos to be completely ineffective with respect to Congress's goal. Gamblers, particularly compulsive gamblers, would simply redirect their business to Indian casinos instead of private casinos. But here the Sign Ordinance allows the City to put a firm cap on the quantum of advertising it allows, precisely because, even when combined with the SFA, the ordinance prevents any redirection or "channeling" in response to it. There is only one agreement with the City, giving one company exclusive advertising rights where the Sign Ordinance already did not apply. Private offsite advertisers cannot now flood transit stops with signs the way formerly private casino gamblers could flood tribal casinos.

Furthermore, unlike, for instance, the distinction between commercial and noncommercial newsracks in *Discovery Network*, here there is "some basis for distinguishing" offsite commercial signage concentrated and controlled at transit stops and uncontrolled, private, offsite commercial signage

"that is relevant to an interest asserted by the city," *see Discovery Networ*k, 507 U.S. at 428. Metro Lights and the district court appear to ignore that without a ban, offsite signage generates precisely the "visual clutter" that motivated both the ordinance and the SFA. Ultimately, whether one considers the Sign Ordinance from the perspective of the City's interest in traffic safety or its interest in aesthetics, the SFA does not work at inexorable cross-purposes to it. Although the SFA permits some advertising, a regime that combines the Sign Ordinance and the SFA still arrests the uncontrolled proliferation of signage and thereby goes a long way toward cleaning up the clutter, which the City believed to be a worthy legislative goal.

At one point in its briefs, Metro Lights suggests that *Metromedia* is inconsistent with cases like *Discovery Network* (and, by implication, *Greater New Orleans*). We take no position on whether such inconsistency is real, but we simply note that we are bound to follow the Supreme Court precedent most directly on point. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). For the reasons we have explained, *Metromedia* is such a case, and it controls the outcome.

2

It remains to discuss the applicability of *Metromedia*'s analysis of the fourth element of the *Central Hudson* test, narrow tailoring. Metro Lights' argument holds even less water here because the narrow tailoring requirement guards against over-regulation rather than under-regulation, *Central Hudson*, 447 U.S. at 565. As *Metromedia* observed: "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." *Id.* at 508. If a complete prohibition would be sufficiently narrowly tailored, then a partial one must also be. All the same, we find several arguments that demand further consideration.

a

First, we note that the district court concluded that the sign ordinance was not narrowly tailored to the City's interests because the City could have "impose[d] the same requirements on other private advertisers that it did on [CBS]," such as by "requir[ing] that any advertisements meet certain specifications ... to promote the City's goals with regard to traffic safety and aesthetics." The district court failed to account for the fact that the City's plan allowed it to supervise a more concentrated supply of offsite signage, which plausibly contributes to its interest in visual coherence as a part of aesthetic quality. This plausible explanation would seem to satisfy *Metromedia's* deferential review, even

if the district court's criticism might have some appeal were we writing on a *tabula rasa*.

b

Metro Lights further argues that the Sign Ordinance, when combined with the SFA, creates a content-based regime rather than a content-neutral one. According to Metro Lights, this justifies a more measured analysis of the narrow tailoring requirement than the summary treatment of *Metromedia*. Indeed, Metro Lights urges us to follow our decision in *Ballen*, where we refused to apply *Metromedia* to a municipal law prohibiting portable signs but creating several "content based exceptions" for various signs, including real estate signs. 466 F.3d at 743. In our view, the municipality "protected outdoor signage displayed by the powerful real estate industry from an Ordinance that unfairly restricts the First Amendment rights of, among others, the lone bagel shop owner [who is the plaintiff]." *Id.* Metro Lights urges us to interpret the SFA as a similar example of a city playing favorites with whose First Amendment rights it chooses to respect.

But the analogy to *Ballen* fails. First of all, the Sign Ordinance is not by its terms a content-based regulation, nor is its non-application to public transit facilities a content-based exception. As counsel for Metro Lights argued, "[the contents of] signs on kiosks are defined by who the speaker is, not by the message." If this is true, then it supports the City's position. For we believe it a false comparison to argue that the City favors CBS over other speakers. CBS doesn't say anything; it only sells space to advertisers who say things. And Metro Lights has

shown no evidence that the City or CBS discriminate among advertisers in the sale of advertising space. Nor is Metro Lights challenging the bidding process by which the City chose CBS as its counter-party to the SFA.

Not to be deterred, Metro Lights drew our attention to additional precedents at oral argument in support of a further variation on this allegation of unconstitutional favoritism. Upping the rhetorical ante, Metro Lights accused the City of "auction[ing] off First Amendment rights" to the highest bidder, in this case CBS. This is strong, if rather sloganeering, language, but after reviewing the case law on which Metro Lights relies, we believe it to be little more than a canard.

Metro Lights bases its argument on a passage from *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In *Nollan* the Supreme Court found a taking without just compensation, in violation of the Fifth Amendment, where a zoning board conditioned a building permit on the grant of an easement to the government. *See generally id.* The Court began by acknowledging that if the refusal to grant a building permit was not a taking, then "a permit condition that serves the same legitimate ... purpose as a refusal to issue the permit should not be found to be a taking [either]." *Id.* at 836. However, "[t]he evident constitutional propriety disappears," according to the Court, "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. The Court then made the analogy which counsel for Metro Lights emphasized

at oral argument, namely that without such a connection:

> the situation becomes the same as if [state] law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one [i.e., raising revenue] which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.

Id. at 837.

According to Metro Lights, the Sign Ordinance, coupled with the SFA, amounts to just such an unconstitutional dispensation-with-taxation system. In reality, however, this is merely the underinclusivity argument repackaged, which we reject for the reasons explained *supra*, at [App. 22-27a]. Nonetheless, we take this contention on its own terms, and we find it premised on a fundamental misreading of *Nollan*.

What makes the tax on shouting fire in a crowded theater unconstitutional, according to the majority in *Nollan*, is that, as a matter of logical necessity, it *changes* the purpose justifying the underlying ban on

shouting fire—no longer for public safety but now for raising revenue. And raising revenue by taxation, though by itself perfectly legitimate state action, does not allow a state selectively to prohibit constitutionally protected conduct. But the SFA does not have the same effect as the hypothetical dispensation-tax; it does not make the Sign Ordinance about raising revenue instead of about safety and aesthetics. It is not as if CBS, by paying the City money and building handsome street furniture, is allowed to sell offsite advertisements wherever it wants, like the man who pays for the privilege of shouting fire in a crowded theater. Moreover, and more importantly, *even if there were no SFA* but only the Sign Ordinance, the City would still exercise proprietary control over who gets to advertise on its transit facilities. Indeed, the City did just that with the two contracts that preceded the SFA. Such control is not an assertion of police power which the City relinquishes at a price, like the hypothetical ban on shouting fire, but a simple attribute of the City's ownership of the transit facilities. What the SFA really does is harmonize the City's interest as a proprietor of discrete pieces of property with its police power interest, manifested in the Sign Ordinance, in goals such as traffic safety and aesthetics.

It appears to us, therefore, that the slogan Metro Lights has advanced, that "First Amendment rights are not for sale," simply misses the point. Certainly the government cannot silence one speaker but not another because the latter has paid a tax, even though it could constitutionally silence both. But that doesn't mean the City cannot silence speakers in

general but permit them to bid for the right to speak on City-owned land, assuming that the speakers on City-owned land do not undermine the goal of the City's general prohibition. As we have explained, the City has not done that in this case because the SFA does not "ensure[ ] that the [Sign Ordinance] will fail to achieve [its] end," or so undermine it that it cannot "materially advance its aim." *Rubin*, 514 U.S. at 489.[13]

IV

Having considered the four elements of the *Central Hudson* test in light of *Metromedia*, we conclude that the SFA does not render the Sign Ordinance unconstitutional under the First Amendment. Indeed, we believe that *Metromedia* compels such conclusion. Though Metro Lights cross-appealed the district court's grant of summary judgment for the City on the issue of damages, such issue is now moot because the City is entitled to summary judgment in its favor on the merits.

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[13] We are aware of other variants of the charge that the City has shown illegal favoritism. Metro Lights has implied several times that the City's overall scheme makes the City a monopolist in the supply of commercial advertising space. Even the district court found the SFA suspect because of its proximity in time to the enactment of the Sign Ordinance and its broad scope relative to the City's previous advertising agreements. But the First Amendment does not prohibit municipal monopolies. As long as the City can show with plausibility sufficient to merit the deference of *Metromedia* that the Sign Ordinance, even coupled with the SFA, advances the City's interests and is narrowly tailored, then the City's policy survives First Amendment scrutiny.

V

For the foregoing reasons, we reverse the district court's grant of summary judgment for Metro Lights and its denial of summary judgment for the City with respect to Metro Lights' First Amendment claims and remand with instructions to dismiss. We dismiss as moot Metro Lights' cross-appeal of the district court's grant of summary judgment for the City with respect to damages.[14]

REVERSED.

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[14] We also dismiss as moot the various requests that the Court take judicial notice.

FILED
April 16, 2009
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

METRO LIGHTS, L.L.C., a New York limited liability company, Plaintiff - Appellee, v. CITY OF LOS ANGELES, a California municipal corporation, Defendant - Appellant.	No. 07-55179 D.C. No. CV-04-01037-GAF(Ex) Central District of California, Los Angeles ORDER

Before: THOMPSON, O'SCANNLAIN, and TALLMAN, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing.

Judges O'Scannlain and Tallman have voted to deny the petition for rehearing en banc and Judge Thompson so recommends. The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc may be filed.

Defendant-Appellant's Request for Judicial Notice in Support of Answer to Plaintiff-Appellee's Petition for Rehearing or Rehearing En Banc is DENIED as moot.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

METRO LIGHTS, L.L.C.,	CASE NO. CV 04-1037 GAF (EX)
PLAINTIFF,	
V.	*AMENDED* MEMORANDUM AND ORDER RE: PLAINTIFF'S AND DEFENDANT'S CROSS-MOTIONS FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION
CITY OF LOS ANGELES,	
DEFENDANT.	

I.

INTRODUCTION[1]

Defendant City of Los Angeles (the "City") has enacted a "Sign Ordinance" that imposes a total ban on newly constructed "off-site signs," which are defined as commercial signs located primarily (but not necessarily) on private property, that advertise anything other than products offered for sale on the premises where the sign is erected. Expressly and conspicuously exempt from the ban are structures erected on public rights of way and those erected under contract with various City entities. L.A.M.C. §§ 91.101.4, 91.101.5. This ban dramatically impacts Plaintiff Metro Lights, L.L.C. ("Plaintiff" or "Metro Lights"), which owns numerous such sign locations throughout the City.

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[1] This Amended Order contains minor revisions to encompass within its analysis the Los Angeles Municipal Code provision, not previously cited or discussed by the City, that explicitly exempts from the Sign Ordinance's scope structures erected on public rights of way and those erected pursuant to a contract with various City entities. *See* L.A.M.C. §§ 91.101.4, 91.101.5. This statutory exemption, *which was brought to the Court's attention only after the March 7, 2006 summary adjudication Order was issued,* actually strengthens the Court's conclusion since it makes express what this Court otherwise considered a "de facto" exception. Thus, this Amended Order in no way alters the Court's ultimate conclusion that the City's Sign Ordinance violates the First Amendment because it fails the test established by the United States Supreme Court in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 447 (1980).

Metro Lights asserts that the Sign Ordinance, which allegedly furthers substantial governmental interests in traffic safety and aesthetics, exists not to serve those purposes but rather to allow the City to generate revenue by exercising a monopoly over off-site signs within the City. In support of this assertion, Metro Lights has established that, approximately six months before enacting the blanket ban on off-site signs, the City entered into a contract under which a private media company, Viacom Decaux, L.L.C. ("Viacom") undertook at its own cost to repair and replace a number of existing bus shelters, and to build several thousand new bus shelters, kiosks and amenities, in exchange for the exclusive right for a period of 20 years to sell and display advertising on this so-called "Street Furniture." In short, the contract permitted Viacom to erect off-site signs on the Street Furniture it constructed under its agreement with the City, and the Sign Ordinance ensured that Viacom would have no competitors in the off-site marketplace.

This case comes before this Court because the City, pursuant to the Sign Ordinance, has cited Plaintiff for allegedly violating the ban on off-site signs. Metro Lights acknowledges that the City may place limits on commercial speech so long as it complies with the requirements of *Central Hudson*, and the City concedes that *Central Hudson* states the proper test for analyzing the constitutionality of its ordinance. (10/31/05 Tr. [Summary Adjudication Hearing] at 21:20-22 ("[W]hen the dust settles on this case it really does always come back to *Central Hudson*.")). Metro Lights contends, however, that the City cannot satisfy that test because the policy

reflected in the Sign Ordinance is substantially undermined by the City's contract with Viacom permitting off-site signs on Street Furniture. The City defends against the suit principally by asserting that: (1) the Sign Ordinance meets the *Central Hudson* test because it directly advances a substantial governmental interest in a narrowly tailored fashion; and (2) the Street Furniture contract cannot be compared with, and is not an exception to, the off-site sign ban since that ban applies only to signs on private property, not signs that appear on Street Furniture in public rights of way.

The Court is now presented with cross-motions for summary judgment. Plaintiff initially moved for summary judgment, which was fully opposed by Defendant. Defendant has since filed its own motion for summary judgment, to which no opposition has yet been filed because the Court sees no need for further briefing on the issues. Defendant's motion is simply the mirror image of Plaintiff's initial motion and it reflects the same arguments made in opposition to the motion presented by Plaintiff. The respective positions of the parties are clearly presented, the factual record is well-developed, and the Court is in a position where it can address all of the issues raised in both motions.

The Court has little doubt that, if this case were only about the Sign Ordinance in the absence of the Street Furniture Agreement, Plaintiff could not prevail on its First Amendment challenge. The ordinance appears directed at precisely the kinds of concerns that, under *Central Hudson* and its

progeny, justify the imposition of limits on commercial speech. The Sign Ordinance, however, does not exist in a vacuum. The question raised by the City's conduct in this case is whether, as required by *Central Hudson*, the Ordinance "directly advances" a substantial governmental interest in a manner that reaches no further than necessary to attain that objective where the City's agreement with Viacom tends to negate the very benefits—traffic safety and protection of the visual environment—that the Ordinance was designed to promote. Stated more simply, the question is this: Can the City use *Central Hudson* as a shield to defeat constitutional challenges to its Sign Ordinance while collecting revenue from a different media company engaged in conduct that appears, on its face, to violate the express terms and purposes of the Ordinance?

The Court concludes that, however the question is stated, the answer is "no." The United States Supreme Court, in addressing the proper scope of limitations on commercial speech, has held that governmental entities may not impose limits on commercial speech to achieve supposed ends that are undermined by other governmental policies. *Greater New Orleans Broad. Ass'n v. United States,* 527 U.S. 173, 188-90 (1999). In the present context, the City cannot engage in conduct that is so inconsistent with, and indeed substantially undermines, the principal objectives of the Sign Ordinance and at the same time enforce that Ordinance against Metro Lights. The Court therefore concludes that Plaintiff's motion for summary adjudication on the First Amendment issue should be **GRANTED** and

that Defendant's cross-motion for summary judgment should be **DENIED** as to the First Amendment issue, but **GRANTED** as to Plaintiff's Equal Protection claim.

II.

STATEMENT OF FACTS

Because Metro Lights's challenge to the Sign Ordinance focuses largely on the agreement between the City and Viacom, the Court begins its discussion of the facts with a very brief summary of the use of bus benches and associated structures, so-called Street Furniture, for advertising purposes.

A. History of Street Furniture Advertising In The City

Until relatively recently, bus benches were installed throughout Los Angeles by various companies under agreements from which the City realized no significant monetary, aesthetic, or other benefit. (Statement of Genuine Issues ("SGI") ¶ 32; Oishi Decl. ¶ 12.). There were virtually no patron-related amenities at bus stops because the costs associated with the capital investment, coupled with the ongoing maintenance and liability costs, were too high. (SGI ¶ 39; Oishi Decl. ¶19).[2]

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2 After the City responded to Plaintiff's statement of uncontroverted facts, the City set forth additional facts in SGI ¶¶ 24-45, many of which Plaintiff did not respond to in its Reply. Regardless, these facts are immaterial since they address the history of city advertising contracts and have no effect on the legal issues presented in these cross-motions.

A major change occurred in 1987 when the City first sold the rights to advertise on bus benches through its Transit Shelter Contract with Shelter Media Communications, Inc. ("SMCI"), (SGI ¶ 25; Oishi Decl., Ex. A [Transit Shelter Contract] at 1). That contract granted SMCI the "exclusive right to display advertising materials on the [transit] shelters." (*Id.*). Similarly, in May 1999, the City entered into the Norman Bus Bench Franchise Agreement (the "Norman Agreement"), (SGI ¶ 27; Oishi Decl., Ex. D [Norman Agreement]), which gave the franchisee the exclusive right to place commercial advertising on bus benches in the City. (Oishi Decl., Ex. D [Normal Agreement] at § 4.3.1). In exchange, the franchisee was required to: (1) pay the City annually $245,626 plus a percentage of the franchisee's annual gross cash receipts, (*id.* at § 4.3.6.2); and (2) place advertising or public service announcements on all bus benches. (*Id.* at § 4.3.16.1).

B. The Street Furniture Agreement

Over time, as the value of the City's Street Furniture as an advertising medium became more apparent, the City became more sophisticated in the sale of these rights by putting the contract out to bid.

1. The Auction And Bidding Process For The Street Furniture Program

The City invited all qualified firms to submit bids for either a 15- or 20-year City-wide Street Furniture Program that included installing and maintaining automated public toilets, kiosks, news racks, and transit shelters. (SGI ¶ 29; Oishi Decl., Ex. F [Coordinated Street Furniture Request for Proposal

("RFP")] at 7). The City's objective in seeking a single contractor to undertake the program was to establish a single point of accountability and to improve the appearance and quality of the Street Furniture in the City so that it is not only aesthetically pleasing, but also styled to harmonize with the surrounding neighborhoods. (Oishi Decl., Ex. F [RFP] at 18, § 4.1). The bidding parties were advised that the City would retain authority to control certain aspects of the content of the signs, (SGI ¶ 19), and the City in fact retained the ability, through the issuance of permits, to dictate the locations within the City where the Street Furniture would be installed. (Oishi Decl., Ex. E [Coordinated Street Furniture Agreement] at § 4.2.1). The City does not dispute this fact. (*See* SGI ¶ 19).

More than two dozen outdoor advertising companies initially responded to the invitation and participated in the bidding process. (Oishi Decl. ¶ 9).

2. THE CITY'S AGREEMENT WITH VIACOM

On December 21, 2001, the City and Viacom entered into a 20-year agreement for Coordinated Street Furniture (the "Agreement" or "Street Furniture Program" or "Street Furniture Agreement"), which remains in force. (SGI ¶ 29; Oishi Decl., Ex. E [Coordinated Street Furniture Agreement]). The Agreement grants Viacom the exclusive right to place thousands of advertising signs on Street Furniture in public rights of way throughout the City. (SGI ¶¶ 7-8, 22). These advertisements fall within the definition of off-site signs because they advertise goods, services, and

entertainment events not offered for sale on the premises where the advertisement is located.

As intended, the contract established the most extensive Street Furniture program in the City's history. Whereas the Norman Agreement only addressed advertising on bus benches, the Street Furniture Program authorized Viacom to advertise, or sell advertising, on a variety of Street Furniture. (*Compare* Oishi Decl., Ex. E [Coordinated Street Furniture Agreement] *with* Ex. D [Norman Agreement]).

In exchange for its exclusive rights under the Agreement, Viacom agreed to replace old bus shelters and to build and maintain several thousand new bus shelters, kiosks, and amenities at its own expense, and to pay the City a minimum annual fee starting at $3,000,000 in the first year, and escalating to $11,500,000 in year 20. (SGI ¶ 10; Oishi Decl., Ex. E [Coordinated Street Furniture Agreement] at 18-19). Over the 20-year period of the contract, the minimum yearly payments total $150,000,000. (*Id.*).

As noted, the City retained some authority to control certain aspects of the content of the signs, (SGI ¶ 19), including a selective ban on advertising containing tobacco or alcohol content, "*unless the [City in its discretion] grants permission otherwise.*" (Oishi Decl., Ex. E [Coordinated Street Furniture Agreement] at § 4.3.7(a) (emphasis added); SGI ¶ 19).

C. THE CITY'S BAN ON ALL NEW COMMERCIAL OFF-SITE SIGNS

Not long after the City entered into this agreement with Viacom, the City banned any new construction of off-site signs within its limits.[3] Recently, the City brought to the attention of this Court that, through its ordinance, it expressly exempts structures erected on public rights of way and through contracts between various City entities from the definition of off-site signs, and therefore that such signs would not fall within the definition of this otherwise City-wide ban. *See* L.A.M.C. §§ 91.101.4, 91.101.5. The present case focuses on the constitutionality of this ban under the First Amendment and relevant case law.

The City regulates outdoor signs through a comprehensive group of ordinances, known collectively as the "Sign Ordinance." *See* L.A.M.C. §§ 91.6201.1, 91.6201.2 ¶¶ 1-2, 6; (SGI ¶¶ 1-3). About six months after the City entered into the Street Furniture Agreement with Viacom, the City enacted a City-wide ban on billboards and other off-site commercial signs for the purported *purpose of improving traffic safety and reducing visual clutter.*

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[3] Specifically, an off-site sign is defined as "a sign which displays any message directing attention to a business, product, service, profession, commodity, activity, event, person, institution or any other commercial message which is generally conducted, sold, manufactured, produced, offered or occurs elsewhere than on the premises where the sign is located." (RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6203).

(Request for Judicial Notice ("RFJN"),[4] Ex. B [Los Angeles City Ord. No. 174547; L.A.M.C. §§ 91.6201-91.6218]). This ban took effect on June 10, 2002. The ban imposes criminal penalties for each violation and each day during which such violation is committed and continues. (RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6202.2).

1. PURPOSE OF THE BAN

The ban expressly articulates its purposes as follows:

> The purpose of [the ban] is to promote public safety and welfare by regulating signs in keeping with the following objectives: (1) [t]hat the design, construction, installation, repair and maintenance of signs *will not interfere with traffic safety or otherwise endanger public safety*; (2) [t]hat the regulations will provide *reasonable protection to the visual environment* while providing adequate conditions for meeting sign users['] needs; (3) [t]hat incompatibility between signs and their surroundings will be reduced; (4) [t]hat both the public and sign users will benefit from signs having *improved legibility, readability and visibility*; (5) [t]hat

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[4] The Court may take judicial notice of documents that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201; *United States v. Wilson*, 631 F.2d 118 (9th Cir. 1980). The Court hereby takes judicial notice of Plaintiff's Exhibits A-F.

> consideration will be given to *equalizing the opportunity for messages to be displayed*; and (6) [t]hat adequacy of message opportunity will be available to sign users without dominating the visual appearance of the area.

(RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6201.2 (emphases added)). The ordinance also prohibits any sign that "constitutes a hazard to the safe and efficient operation of vehicles upon a street." (*Id.* at § 91.6205.5.1).

2. SCOPE OF THE BAN

The Sign Ordinance distinguishes between off-site and on-site signs. (RFJN, Ex. A [L.A.M.C. Sign Ordinance] §§ 91.6201.3, 91.6203; SGI ¶ 4). An off-site sign is one that directs attention to goods, services or other commercial activities, which may be found at some location *other* than where the sign itself is located. (RFJN, Ex. A [L.A.M.C. Sign Ordinance] § 91.6203; SGI ¶ 5). The ordinance applies to all *new* off-site signs (RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6205.11; SGI ¶ 6).[5] That is, existing off-site signs were permitted

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[5] "Signs are prohibited if they ... [a]re off-site signs, except when off-site signs are specifically permitted pursuant to a variance, legally adopted specific plan, supplemental use district or an approved development agreement. This shall also apply to alteration or enlargements of legally existing off-site signs." (RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6205.11(11); *see also id.*, Ex. B [Amendment to Sections 12.21 and 91.6205.11] at § 1(7)(l)).

to remain pursuant to a variance, but were indirectly and eventually eliminated as they became non-conforming. Moreover, the ban applies only to commercial off-site signs and does not implicate noncommercial advertisements.[6] (RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6203).

At the time the City's ban took effect, there were approximately 18,500 transit shops located in the City, many of which contained benches or transit shelters with commercial advertising on them. (SGI ¶ 31; Oishi Decl. ¶ 11). Without citing to any evidence, the City simply asserted that the Sign Ordinance applies only to private property and not to the public rights of way on which the City's Street Furniture is located. (SGI ¶ 21). In fact, as supporting evidence to dispute Plaintiff's contention that the Sign Ordinance only applied to private property, the City conspicuously failed to cite L.A.M.C. §§ 91.101.4, 91.101.5, which explicitly exempted such structures located on public rights of way from the definition of "off-site" signs. (*See id.*). These provisions came to the Court's attention after the original March 7, 2006 summary adjudication

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[6] The definition of off-site under L.A.M.C. § 91.6203 is limited to signs containing commercial messages. *See Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 815 (9th Cir. 2003) ("[T]he recent amendment striking the words 'or noncommercial' from the definition of 'Off-Site Sign' in L.A.M.C. § 91.6203 ... is important because it makes it impossible that a noncommercial sign would be designated an 'off-site' sign .... In effect, the amendment creates an exemption for noncommercial off-site signs.").

ruling, which caused this Amended and clarifying Order to issue. This additional evidence, however, only reinforces the Court's ultimate conclusion that the Sign Ordinance violates *Central Hudson*.

3. Effect of the Ban—the Exception for Viacom

Although the City's ban purports to prohibit all new off-site signs, the City allows thousands of off-site signs to be displayed on existing bus shelters and freestanding kiosks, which are located on public rights-of-way throughout the City, through its exclusive contract with Viacom. (*Id.* ¶ 20). That public rights of way and contracts with City entities are expressly exempted from the official definition of an off-site sign does not change the fact that Viacom and the City are permitted to control the content of commercial advertisements. (*See id.* ¶ 19). On the contrary, it codifies what the Court previously viewed to be the de facto effect of the City's Sign Ordinance.

D. Plaintiff's Outdoor Advertising Business

Plaintiff sells advertising space on its outdoor signs, which are erected on property leased from private owners throughout the City of Los Angeles and California. (*Id.* ¶ 12). National and local advertisers buy space on Plaintiff's signs in order to display a variety of messages, including the commercial messages at issue in this case. (*Id.* ¶ 13; Rush Decl. ¶ 4; *see* also Neighbors Decl. ¶ 8). Plaintiff owns numerous existing real property sites where it operates and maintains off-site signs within the City, some of which currently violate the City's ban. (SGI ¶ 14; Rush Decl. ¶ 3). In addition,

Plaintiff has leased other locations from property owners throughout the City, and the ban prevents Plaintiff from lawfully using these locations for off-site signs. (SGI ¶ 15). Thus, these other locations remain vacant. (*Id.*).

Beginning around December 2003, the City learned that Metro Lights installed off-site commercial signs on private property at a number of sites within the City without obtaining building or electric permits as required. (*Id.* ¶ 44; Neighbors Decl. ¶ 6). The City issued Plaintiff numerous citations for violating the Sign Ordinance. (Rush Decl., Ex. B [Orders to Comply]).

E. The Effect of the Street Furniture Signs

1. Size and Placement

Plaintiff's off-site signs are the same size as the advertising signs that the City allows on its Street Furniture. (SGI ¶ 16). However, many of the City's off-site signs are located on public sidewalks, and are therefore *closer to traffic lanes* than Plaintiff's signs, which are located on private property and set back from the street. (*Id.* ¶ 17).

2. Effects

Given their placement, the signs installed on City-owned property by Viacom *may* represent a *greater traffic hazard* than the signs owned and maintained by Plaintiff. (*Id.* ¶ 18). Each side advances expert opinions of the ban's effect on traffic safety and aesthetics.

Plaintiff presents the declaration of a registered traffic safety engineer with 30 years experience who concludes that some of Viacom's signs on City

property actually pose a greater threat to traffic safety than Plaintiff's off-site signs located on private property. (Kunzman Decl. ¶ 14). Plaintiff's engineer conducted a study of seven separate locations where Metro Lights has signs located in Los Angeles. (*Id.* ¶ 4). At each location, he found signs on Street Furniture with the exact dimensions of those displayed by Metro Lights. (*Id.*). All of the City's signs were closer to the curb; on average, Metro Lights's signs were more than three times farther from the curb face than the bus shelter signs, the former averaging 19.3 feet from the curb and the latter averaging 5.3 feet away. From this, the engineer notes that the bus shelter signs are *more visible* to a driver than Metro Lights's signs, and therefore "potentially a greater distraction than any of the signs owned and operated by Metro Lights." (*Id.* Decl. ¶¶ 5-8, 14 & Ex. C; Mot. at 10).

The City, in contrast, presents the declaration of the Contract Administrator of the Street Furniture Agreement, a *registered* Landscape Architect in charge of managerial oversight of the Street Furniture Program, who states that "the advertising panels on the new [S]treet [F]urniture may not cause any more traffic and public safety impacts than the advertising on the old [S]treet [F]urniture." (Oishi Decl. ¶¶ 2, 24). This statement is based on the flawed premise that the Street Furniture Program only replaces old Street Furniture, and therefore cannot cause any more increased traffic or safety impacts than the old furniture. (*Id.* ¶ 24; Oishi Decl., Ex. E [Street Furniture Agreement] at § 4.2).

III.

DISCUSSION

A. THE LEGAL STANDARD FOR A MOTION FOR SUMMARY JUDGMENT

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). All justifiable inferences were made in favor of the non-moving party, and the moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56 (1986). Summary judgment may be granted on part of an action, *Lewis v. Anderson*, 615 F.2d 778 (9th Cir. 1979), including questions of liability. *KMLA Broad v. Twentieth Century Cigarette Vendors*, 264 F. Supp. 35 (C.D. Cal. 1967).

A party opposing a properly made and supported motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). An issue is genuine if evidence is produced that would allow a reasonable jury to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. Only admissible evidence may be considered on a motion for summary judgment. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1989). The Court will assume the truth of direct evidence set forth by the opposing party, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992), but where

circumstantial evidence is presented, the Court may consider the plausibility and reasonableness of interferences arising therefrom. *See Anderson*, 477 U.S. at 249-50.

In order to succeed on a plaintiff's motion for summary judgment, that plaintiff "'must establish beyond peradventure all of the essential elements of the claim or defense to warrant judgment in [its] favor.'" *United States ex rel. Jordan v. Northrop Grumman Corp.*, No. 95-2985 (ABC), 2002 U.S. Dist. LEXIS 26674, at *18-*19 (C.D. Cal. Aug. 5, 2002) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986)). Stated another way, because Plaintiff has the burden of proof at trial, he "must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party." *Id.* (citations and quotations marks omitted).

The Court will view the evidence in the light most favorable to the defendant. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003). "Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment." *Indep. Cellular Tel., Inc. v. Daniels & Assocs.*, 863 F. Supp. 1109, 1114 (N.D. Cal. 1994).

B. THRESHOLD DISPUTES

As an initial matter, the City argues that Plaintiff's motion is procedurally improper because: (1) it would prejudice the City since the City has not yet taken discovery related to whether this litigation is moot since discovery could uncover that Plaintiff's signs are disallowed under zoning and building code

regulations; and (2) Plaintiff allegedly misrepresented to the Court and the City in the Joint Scheduling Conference Report that this matter would likely be disposed of by cross-motions for summary judgment. (Opp. at 7).

1. THE STANDARD

Rule 56(f) permits a party to oppose a motion for summary judgment by demonstrating that it needs time for additional discovery. To obtain such relief, the opposing party's declarations must show that it "cannot for reasons stated present by affidavit facts essential to justify the party's opposition," and the Court may deny the motion for summary judgment or continue the hearing to allow additional discovery. Fed. R. Civ. P. 56(f). However, courts do not routinely grant Rule 56(f) requests on the perfunctory assertion that the party cannot respond because it needs to conduct discovery.

> References in memoranda and declarations to a need for discovery do not qualify as motions under Rule 56(f). Rule 56(f) requires affidavits setting forth the particular facts expected from the movant's discovery. Failure to comply with the requirements of Rule 56(f) is a proper ground for denying discovery and proceeding to summary judgment.

Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986). In short, the opposing party must explain with particularity why it is unable to oppose the motion, state with specificity what facts it intends to seek through discovery, and show how its discovery efforts are reasonably

expected to create a triable issue. *See In re Silicon Graphics Litig.*, 183 F.3d 970, 989 (9th Cir. 1999); *Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1389 n.5 (Fed. Cir. 1989).

As discussed below, the City has not met this standard.

2. DISCOVERY AND MOOTNESS

The City claims that further discovery will demonstrate that Plaintiff's signs are disallowed under zoning and building regulations, reasons separate and independent of the City's ban on off-site signs, including: (1) the City's sign location and spacing rules that require a certain distance between commercial signs to reduce cluttering, (RFJN, Ex. A [L.A.M.C. Sign Ordinance] §§ 91.6218.2, 91.6218.4); (2) City specific plans that would independently prohibit the off-site signs, (*id.* § 91.6205.11.11); or (3) the absence of a lease for a sign site, (Fong Decl. ¶ 6). For that reason, the City asserts it must discover the precise location of all of Plaintiff's signs, claiming that Plaintiff has erected additional signs since the injunction was issued. However, for multiple reasons additional discovery need not be ordered in the case.

First, Plaintiff only admits to having "leased additional sites for the installation" of signs, rather than admitting to actually having erected new signs, and the City offers no evidence to support its conclusion that new signs have actually been erected in violation of these other ordinances. (*See* Mot. at 8). Indeed, contrary to the City's accusation, Plaintiff provides a declaration that it has not

proceeded with the placement of any new signs due to the City's off-site ban. (Rush Decl. ¶ 3).

Second, in making its argument that numerous signs erected and displayed by Plaintiff violate aspects of the Sign Ordinance other than the off-site sign ban, (SGI ¶ 45; Opp. at 9; Neighbors Decl., Ex. A [Metro Lights Sign Locations and Corresponding Code Violations] at 4-5), the City has acknowledged that it knows the location of all of Plaintiff's signs listed in the injunction. (*Id.*; Opp. at 8).

Third, the City has recently issued numerous citations against Plaintiff for violations of local law, but all of those citations involve allegations that Plaintiff has violated the Sign Ordinance, L.A.M.C. § 1.6205.11.11, not any of the other ordinances whose alleged violation gives rise to the need for additional discovery. (Rush Decl., Ex. B [Order to Comply]). Thus, the City appears to have neither a need for further discovery nor any intention of enforcing any ordinance against Metro Lights other than the off-site sign ban.

Moreover, even if the City actually needed the discovery, its belated insistence on the necessity of delaying the resolution of the current motion is insufficient to warrant the requested relief. The current action was filed on February 17, 2004, and had been pending for nearly 20 months when Metro Lights filed its motion. Thus, the City had ample opportunity to conduct discovery on the aforementioned issues, which it claims may render this lawsuit moot. However, for what reason, the City failed to do so.

Finally, in context, the argument in favor of a continuance is beside the point. The City's numerous citations accusing Plaintiff of violating the off-site sign ban demonstrate that the issue is not moot, since there is an ongoing controversy between the parties over compliance with the off-site sign ban. Moreover, even if the City were to dismiss every outstanding citation against Metro Lights, such action would not moot this case. As the Supreme Court has noted, the voluntary cessation of challenged conduct moots a case only where it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 221 (2000) (bold emphasis added); *see also* Erwin Chemerinsky, *Federal Jurisdiction*, §§ 5.5.3 - 5.5.4 at 131-140 (4th ed. 2003) ("Chemerinsky, *Federal Jurisdiction*"). That is, even dismissal of every citation would not deprive Plaintiff of standing to pursue its challenge to the off-site sign ban. Standing to challenge allegedly wrongful conduct is determined at the time the suit is filed, *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 520 (6th Cir. 1976), and is satisfied where the threatened injury—enforcement of the off-site sign ban—is likely to recur. *Armstrong v. Davis*, 275 F.3d 849, 861 (9th Cir. 2001). Thus, while the City might have grounds other than the off-site sign ban for citing Plaintiff, that fact does not operate to resolve the issue now before the Court. The Court therefore will not continue the matter to allow for discovery that it would not permit in the first instance.

3. Misrepresentation

The City also claims that Plaintiff misrepresented its intentions in the Joint Scheduling Conference Report filed July 7, 2005, in stating that the matter would likely be disposed of by cross-motions for summary judgment. Instead, the City claims Plaintiff filed its motion without coordinating a cross-motion with the City and that failure even to consult the City violates Local Rule 7-3. (Opp. at 10).

However, Plaintiff avers that the parties met and conferred regarding the timing of the hearing on Plaintiff's motion for partial summary judgment, and that these discussions broke down. Additionally, Plaintiff claims that the City's previous *ex parte* application to continue the hearing made no mention of a need for additional time to allow the City to bring its own coinciding motion for summary judgment.

The Court concludes that it can properly address and resolve Plaintiff's motion for summary judgment, as Plaintiff is entitled to bring its own motions and the Court does not find any affirmative misrepresentation by Plaintiff. Moreover, the City has now filed its own motion which raises essentially the same issues presented in Plaintiff's motion, which presents the Court with virtual cross-motions. This Order will resolve the entire controversy.

C. The Street Furniture Program's Effect on the Ban's Constitutionality

The City has two arguments as to why the Street Furniture Program is not even subject to the City's ban on off-site signs. First, the City argues that the

Street Furniture Program is long-standing, independent of the newly enacted ban, and therefore not subject to the ban. Since the Street Furniture Program previously existed and is not subject to the ban, on this basis the City insists that it does not constitute an "exception" to the ban and has no bearing on the Sign Ordinance's constitutionality. (Opp. at 10). Second, the City argues that the Street Furniture Program is not subject to the ban because it does not add any new net signage, and therefore has no role in the analysis of the constitutionality of the off-site sign ban. For these broad propositions, the City cites no legal authority—at least before the filing of its motion for reconsideration.

1. THE STREET FURNITURE PROGRAM'S INDEPENDENCE FROM THE NEWLY ENACTED BAN HAS NO EFFECT ON THE CONSTITUTIONAL ANALYSIS

The City correctly asserts that the Street Furniture Program was enacted prior to the effective date of the off-site sign ban and argues that this Program simply continues the Norman Agreement and the Transit Shelter Contract. The City points to several facts, including the similarities between the old programs and the new Street Furniture Program such as the relatively similar size of the billboards authorized under the various contracts. From the chronology and the similarities to the older programs, the City claims that the Street Furniture Program has no connection to the ban. The City overstates the facts, and provides no support for its legal conclusion.

As a matter of fact, none of the earlier contracts were nearly so extensive, or so lucrative for the City, as the City's current agreement with Viacom. Likewise, none of the earlier contracts so clearly focused on encouraging the erection of off-site sign signs on Street Furniture. But even assuming that each of these earlier agreements allowed the erection of off-site signs, that fact has nothing to do with the legal change that occurred in 2002 when the City banned new off-site signs throughout Los Angeles, making the City's contractor the sole vendor of off-site advertising space within the City's limits. More specifically, the City's argument does not address: (1) the critical elements of the *Central Hudson* test which permit only narrowly tailored limitations on commercial speech for the sole purpose of directly advancing a substantial government interest; or (2) the anomaly of enacting a ban on certain kinds of signs to achieve certain focused governmental objectives while allowing the City-chosen private contractor to erect the same kinds of signs throughout the City. For these reasons, the historical argument has no persuasive effect.

2. THE STREET FURNITURE PROGRAM'S ALLEGED LIMITED EFFECT ON NEW SIGNAGE HAS NO BEARING ON THE CONSTITUTIONAL ANALYSIS

The City also contends that the Street Furniture Program will not increase net signage, and therefore that it is not subject to the ban. (Opp. at 13). First, the Court notes that the Sign Ordinance does not establish a "net signage" limit within the City. Rather, it purports to ban all off-site signs

throughout the City without any limitation, caveat or proviso. Moreover, the "no increase in signage" statement might mislead the casual reader because, in fact, the Street Furniture Program allows the erection of thousands of signs during the contract period while existing off-site signs are allowed to exist as legal non-confirming uses. Thus, for at least some extended period, the total signage in the City in fact increases since pre-existing signs can remain, though unmodified, repaired, or update. This effect is rather iconic and creates constitutional problems given the fact that the City's stated purpose is to decrease visual clutter and improve traffic safety in the City.

Moreover, the City's own Opposition to Plaintiff's motion recognizes that "new [S]treet [F]urniture will be located *primarily* at existing transit stops," (*id.* (emphasis added)), acknowledging that new locations will be created where new signs will be erected. The City openly acknowledges that the Street Furniture Agreement sets procedures for "selecting the locations for the *new* transit shelters." (*Id.*, Oishi Decl., Ex. E [Street Furniture Agreement] at §§ 4.2 - 4.2.2. (emphasis added)). Thus, the Agreement does not preclude the addition of new signage and therefore may not serve to decrease visual clutter, increase aesthetic appeal, or in any way improve traffic safety.

Moreover, like the "pre-existing program" argument described above, the City makes little effort to demonstrate that this "net signage" argument addresses either the elements of *Central Hudson* or the anomaly of enacting a ban on off-site

signs while operating a program that permits them. Accordingly, the Court concludes that these arguments must rise or fall under a rigorous application of the *Central Hudson* test. The Court therefore turns to that case and its progeny to determine whether the City's off-site sign ban set forth in its Sign Ordinance passes constitutional muster.

D. THE BAN'S CONSTITUTIONALITY UNDER *CENTRAL HUDSON*

Plaintiff claims that the City's off-site sign ban fails the third prong of *Central Hudson* because the broad exemption under the Street Furniture Program renders the ban so underinclusive that the restriction on speech does not *directly advance* the City's interests. (Mot. at 12, 15). The City responds that even if it were appropriate to characterize the Street Furniture Program as an exception to the ban, the ban still sufficiently furthers aesthetics and traffic safety such that the third prong of *Central Hudson* is satisfied. (Opp. at 16). For the detailed reasons set forth herein, the Court disagrees.

1. THE *CENTRAL HUDSON* TEST[7]

Though entitled to some First Amendment protection, commercial speech is afforded less protection than other forms of expression. *Central*

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[7] The City does not contest Plaintiff's contention that "[t]he contract between the City and Viacom gives the City the ability to control certain aspects of the content of the signs." (SGI § 19; Oishi Decl., Ex. E [Coordinated Street Furniture Agreement] at § 4.3.7(a)). Moreover, the Sign Ordinance itself bans only "off-site" signs, not "on-site" signs. (RFJN, Ex. A [L.A.M.C. Sign Ordinance] § 91.6205.11). The on-site/off-site distinction in this case is inherently based on content. *(Id.* § 91.6203 (defining off-site signs on the basis of the message they carry)). Just as in *Metromedia, Inc. v. City of San Diego* ("*Metromedia*"), "[t]o determine if any billboard is prohibited by the ordinance, one must determine ... what message it carries." 453 U.S. 490, 503 (1981). Only commercial messages not pertaining to the business where the sign is located are prohibited. The City has "chosen to favor certain kinds of messages—such as onsite [] advertising ... over others." *Id.* at 519. Importantly, these findings have little effect on the Court's analysis since restrictions on commercial speech must be analyzed under *Central Hudson* unless and until the Supreme Court holds otherwise. *See Valley Broad. Co. v. United States*, 107 F.3d 1328, 1331 (9th Cir. 1997) ("[T]he Supreme Court has continued to apply *Central Hudson* in the commercial speech context."); *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Metromedia*, 453 U.S. at 507 ("We [] adopted a four-part test for determining the validity of government restrictions on commercial speech" and "Appellants agree that [the *Central Hudson* test is] the proper approach."). For this reason, the Court sees no need to address Plaintiff's alternative, non-*Central Hudson* argument that the Sign Ordinance otherwise constitutes an impermissible content-based restriction on speech since the proper test in this case is *Central Hudson*, and the Sign Ordinance fails under that analysis.

Hudson, 447 U.S. at 562-63; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (speech motivated by a purely economic interest is not disqualified from protection under the First Amendment). The Supreme Court has reiterated and reaffirmed that the *Central Hudson* test is appropriately employed in determining "whether a particular commercial speech regulation is constitutionally permissible." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002). The protection for a particular commercial expression turns on the nature of the expression and the governmental interests served by its regulation. *Central Hudson*, 447 U.S. at 562-63. Under *Central Hudson*, a governmental restriction on commercial speech is protected by the First Amendment if the speech: (1) concerns lawful activity and is not misleading; (2) seeks to implement a substantial government interest; (3) directly advances that interest; and (4) reaches no further than necessary to accomplish the objective. *Id.* at 562-66. The Supreme Court has held that traffic safety and a city's aesthetics are substantial governmental interests. *Metromedia*, 453 U.S. at 507-08.

With regard to the third prong, that the regulation directly advance the government's interests, the Supreme Court has noted that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (citations omitted). Therefore,

"'the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.'" *Id.* (quoting *Central Hudson*, 447 U.S. at 564).

The fourth prong of the test complements the direct-advancement inquiry of the third prong, asking whether the speech restriction is more extensive than necessary to serve the interests that support it. *Id.* This element of the *Central Hudson* test does not require that the City adopt the least restrictive means for achieving its objectives. *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989); *Outdoor Sys. Inc. v. City of Mesa*, 997 F.2d 604, 610 (9th Cir. 1993). Rather, *Central Hudson* requires only a "reasonable fit" between the government's ends and the means chosen to accomplish those ends. *Fox*, 492 U.S. at 480; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 (requiring "a fit that is not necessarily perfect, but reasonable"). Thus, as long as the means are narrowly tailored to achieve the desired objective, the structure of the regulation should be left to the judgment and discretion of governmental decision-makers. *Id.*; *Outdoor Sys. Inc.*, 997 F.2d at 610.[8]

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[8] *But see Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (involving a challenge to a provision of the Federal Alcohol Administration Act which prevented beer labels from displaying the beer's alcohol content where the Court seemed to apply a "least restrictive alternative" analysis); *see also* Erwin Chemerinsky, *Constitutional Law: Principles & Policies* § 11.3.7.3, at 1051 (2d ed. 2002) ("Chemerinsky, *Constitutional Law: Principles & Policies* § 11.3.7.3, at 1051 (2d ed. 2002) ("Chemerinsky. *Constitutional Law*"). Nonetheless, more

The government has the burden of proving that the *Central Hudson* test is satisfied in order to justify a restriction on commercial speech, as the Supreme Court has repeatedly held that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 71 n.20 (1983); *Edenfield v. Fane,* 507 U.S. 761, 770 (1993).

2. DISCUSSION

The first and second elements of the *Central Hudson* test are easily satisfied in this case. Advertising is undisputably a lawful activity and there has been no allegation that any of Plaintiff's advertisements are misleading. Likewise, the regulation here purports to advance the substantial governmental interests of promoting public safety and welfare by ensuring that the signs do not interfere with traffic safety and by reducing visual clutter by requiring a degree of compatibility between the signs and their surroundings. (RFJN, Ex. A [L.A.M.C. Sign Ordinance] at § 91.6201.2). First Amendment jurisprudence in the area of commercial speech teaches that a local government's interest in aesthetics and traffic safety are substantial and will, so long as the other elements of the test are satisfied, justify limitations on

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recently the Court reaffirmed *Fox's* rejection of the least restrictive means requirement, which reinforces the conclusion that it is not a requirement of the *Central Hudson* test. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 188 ("The Government is not required to employ the least restrictive means conceivable.").

commercial speech. *See Metromedia*, 453 U.S. at 507-08 (goals advanced by the city to justify the billboard restriction - traffic safety and aesthetics - were "substantial government goals"); *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984) (city's interest in reducing visual clutter sufficient to justify a prohibition on billboards); *Nat'l Adver. Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) ("The City may prohibit billboards entirely in the interest of traffic safety and aesthetics."). Therefore, the first and second prongs of *Central Hudson* are satisfied.

The third and fourth prongs require that the means employed by the regulation directly advance the substantial governmental interest in a way that is narrowly tailored to serve those interests. The Court concludes that the City's approach to limiting the proliferation of commercial signs within its limits fails to overcome these two hurdles.

a. Directly Advancing a Substantial Government Interest—Traffic Safety

The Sign Ordinance, on its face, sets forth a limitation that, standing alone, would meet the *Central Hudson* requirements. On the one hand, the ordinance permits private property owners to erect signs, within size limitations established by the City, that advertise products offered for sale on the premises and to erect signs that display non-commercial messages. On the other hand, it prevents anyone from erecting a sign that displays a commercial message for goods or services that are not offered for sale on the premises. Such limitations have been expressly upheld in prior cases as a means

of promoting traffic safety. *Metromedia*, 453 U.S. at 507-08. But the Sign Ordinance does not stand alone.

At the same time that the City, through its Sign Ordinance, bans the erection of all new off-site signs, the City's Street Furniture Program gives the City's contractor an exclusive right to place thousands of off-site signs next to traffic lanes in every area of the City where a transit shelter, kiosk or "amenity" is located. The dichotomy undermines the Sign Ordinance's stated interests since many of the Street Furniture advertisements, which are placed at street level, are designed precisely to attract the attention of all who pass by, including those driving automobiles whose focus would be better directed toward the operation of their vehicles. For this reason, the Street Furniture Program cannot be squared with the Sign Ordinance's states purpose of promoting traffic safety. Given that Plaintiff's off-site signs are the same size as the advertising signs that the City allows on its Street Furniture, (SGI ¶ 16), and that Plaintiff's signs are set back away from the traffic lanes of the street, (*id.* § 17; Fisher Decl., Ex. A [Photographs of a Kiosk Sign]; Rush Decl., Exs. C & D [Photographs of off-site signs on a bus shelter]), the Court is hard pressed to see how the City can reconcile the impact of the Street Furniture Program with the Sign Ordinance's stated objective of promoting traffic safety.

Plaintiff presents evidence from a traffic engineer with 30 years of experience who conducted a survey and concluded that the City's off-site sign depicted in a photograph posed a potentially *greater traffic*

hazard than the Metro Lights sign. (Kunzman Decl. ¶ 14; Mot. at 10). However, this evidence is not necessary to the Court's ruling since the study tends to confirm that which common sense suggests.[9] If a sign is in the field of vision of a driver, which is undisputably the case with the Street Furniture signs, it will have the potential of distracting the driver from his or her primary task of safely operating the vehicle. The Court considers the precise location of the sign in the field of vision to be immaterial to the First Amendment analysis in this case. While experts might argue over the degree of distraction created by signs that are 30 degrees off a driver's visual axis as opposed to those 45 degrees off axis, there can be little dispute that advertising materials at or near the public right of way seek the attention of the driver and create some identifiable, if not measurable, level of distraction. No persuasive

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[9] As noted in the Statement of Facts above, the City attempted to undermine Plaintiff's expert with a declaration from the Contract Administrator of the Street Furniture Program. Notably, that declaration asserted only that the new advertising panels "*may* not cause any more traffic and safety impacts that the advertising on the old [S]treet [F]urniture." (Oishi Decl. ¶¶ 2, 24 (emphasis added)). That statement provides no help to the City, and indeed lends support to Plaintiff's argument. When the old Street Furniture was constructed and installed, the Sign Ordinance which is at the center of this case had not been adopted, so no First Amendment issue was implicated at that time. On the other hand, the declaration amounts to a concession that signs on Street Furniture affect traffic safety, thus implicitly conceding that Street Furniture signs tend to undermine the principal objective of the Sign Ordinance.

argument can be made that off-site signs, which the Sign Ordinance suggests are a traffic safety hazard, are measurably less dangerous by virtue of being placed adjacent to the public rights of way as opposed to being further off the visual axis.

Greater New Orleans Broad. Ass'n speaks directly to the issue now before this Court. 527 U.S. 173. In that case, the FCC had issued regulations banning the advertisement of privately operated commercial casino gambling. The FCC applied the ban to several New Orleans area licensed broadcasters, who contended that they should be permitted to sell and broadcast advertisements for legal casino gambling in Louisiana. The FCC refused to allow this broadcasting on the ground that the broadcast signals could, under certain circumstances, reach into Texas and Arkansas where private casino gambling was prohibited. The District Court sided with the government and held, under *Central Hudson*, that the ban directly advanced a substantial governmental interest through a means that was no more extensive than necessary to achieve its purposes. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 181. The Fifth Circuit affirmed.

The Supreme Court disagreed and reversed the lower court decisions holding that the FCC regulations, as applied in that case, violated *Central Hudson*. As in this case, the Supreme Court found that the ban satisfied the first two elements of the test, but failed to "directly advance" the identified governmental interests in alleviating the deleterious effects of gambling. The Court noted, as a principal

basis for its decision, the inconsistencies in governmental policies relevant to gambling:

> While it is no doubt fair to assume that more advertising would have some impact on overall demand for gambling, it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another. *More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce.*

Greater New Orleans Broad. Ass'n, 527 U.S. at 189 (emphasis added). Accordingly, the Court observed:

> We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however, because the flaw in the Government's case is more fundamental: The operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.

Id. at 190. In the end, therefore, the Court concluded that "there was 'little chance' that the speech restriction could have directly and materially advanced its aim, while other provisions of the same Act directly undermined and counteracted its effects." *Id.* at 193 (citations omitted).

The City's adoption of the Sign Ordinance after establishing the Street Furniture Program through its contract with Viacom creates a similar situation here. The City, on the one hand, enacted the Sign Ordinance for the express purpose of promoting traffic safety and eliminating visual clutter, while, on the other hand, awarding a large contract that permits its contractor to do precisely what its Ordinance prohibits. In short, the two operate at cross purposes. On this point, the Supreme Court has held that:

> There can be no question that a prohibition on the erection of billboards infringes freedom of speech: The exceptions do not create the infringement, rather the general prohibition does. But *the exceptions to the general prohibition are of great significance in assessing the strength of the city's interest in prohibiting billboards.*

Metromedia, 453 U.S. at 520 (emphasis added). Under such circumstances, the Supreme Court, applying the *Central Hudson* test, barred the enforcement of the FCC advertisement ban precisely because it was in conflict with other governmental policies. *See Greater New Orleans Broad. Ass'n*, 527 U.S. at 189-90, 193.

Although the relevant First Amendment jurisprudence seems quite clear, the City seeks to divert attention from its difficulties under *Central Hudson* with a factual and a legal argument, neither of which warrant lengthy discussion. From a factual standpoint, the City asserts that buses operated by the Metropolitan Transit Authority display

advertisements that closely resemble those found on Street Furniture and that those signs can be equally, if not more, distracting than the signs found on Street Furniture. (SGI ¶ 42). Even if true, the City's argument misses the mark. The issue before this Court is not whether other forms of signage or advertising pose a danger to traffic safety, but whether the Sign Ordinance directly advances the goal of enhanced traffic safety while permitting the same advertisements through the Street Furniture Program. The fact that other forms of advertisement may also undermine traffic safety will not save the Sign Ordinance under the *Central Hudson* test.

As legal support for its position, the City suggests that *MBC Realty, LLC v. Mayor & City Council of Baltimore*, 351 F. Supp. 2d 420 (D. Md. 2005) ("*MBC Realty*"), an out-of-circuit district court decision, supports its defense of the Sign Ordinance. Even if *MBC Realty* had been decided in the Ninth Circuit, it would be of no help to the City in this case. In *MBC Realty*, a group of downtown Baltimore commercial property owners filed an equal protection challenge and state-law claims against certain local ordinances that outlawed new billboards everywhere in the city, while granting authority for the erection of billboards on a city-owned sports arena in a downtown business district. The court held that Baltimore's exception did not violate the Equal Protection Clause since the city council's actions were not irrational. Specifically, the court concluded that "the exception to the city-wide billboard moratorium which permits the installation of billboards on the arena in the downtown business district is rationally related to the overarching

concern for the general health and welfare which animated the imposition of the moratorium on billboards in the first place." *Id.* at 425.

This brief discussion demonstrates that *MBC* Realty addressed different legal questions in a radically different context. First, that case addressed an equal protection question raised by a plaintiff who did not even allege a First Amendment violation. The court expressly noted that the plaintiffs "[did] not remotely suggest that they have asserted a First Amendment or other fundamental right in this case[,] and they explicitly concede that 'rational basis' is the appropriate standard of review." *Id.* Second, *MBC Realty* involved a city-wide ban on billboards, with only a single exemption for the placement of signs at a city-owned sports arena. The ban in the instant case is much broader, allowing Viacom to place signs virtually anywhere Street Furniture exists or is later constructed. Third, in *MBC Realty* the ordinance at issue required that "all bills seeking approval of such a conditional use had to be accompanied by a plan for the removal of at least one existing general advertising sign for each proposed sign." *Id.* at 423. Thus, there was no net increase in signage, the real possibility of which exists here.

Despite these obvious differences in the issues addressed in *MBC Realty*, the City contends that the Court should infer from the ruling on the equal protection issue that the court must have found that the city-wide ban still furthered the goals of aesthetics and traffic safety. The Court finds no logical basis for making such a leap. To find that the

equal protection rational basis test was satisfied, the court needed only to find some conceivable, rational purpose for the ban and the exemption, which could have been something other than traffic safety or aesthetics. Given the difference in the equal protection and First Amendment jurisprudence, nothing in the case would support any implicit conclusion regarding either aesthetics or traffic safety. Thus, even if the Court were bound to follow this decision, it would limit its consideration of the case to the text of the memorandum and not to what the court failed to say but "must have" meant.

In short, having reviewed the record, the undisputed facts and the parties' authorities, the Court concludes that the record falls short of establishing, as a matter of law, that the Sign Ordinance directly advances the City's substantial interest in traffic safety. On the contrary, given the lack of any real dispute regarding the material facts in the case, the Court concludes that the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in traffic safety. *See 44 Liquormart v. R.I.*, 517 U.S. 484, 505 (1996) ("[A] commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.") (citation and quotation marks omitted). The City cannot, on the one hand, preclude Plaintiff from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout the City of Los Angeles. Thus, the Court concludes that

"[traffic] safety is a stated but unfounded goal and does not support the differential treatment" in a manner consistent with our Constitution. *See Sandhills Ass'n of Realtors v. Village of Pinehurst*, No. CV-98-303 (RAEx), 1999 U.S. Dist. LEXIS 19094, at *28 (M.D.N.C. Nov. 8, 1999).

b. Directly Advancing a Substantial Government Interest—Aesthetics

The City also suggests that the Sign Ordinance furthers the City's interest in aesthetics and that the Sign Ordinance passes constitutional muster on this ground.[10]

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[10] As an initial matter, contrary to the City's argument in its cross-motion, it is unclear whether aesthetics *alone* is a sufficiently substantial justification for a restriction on commercial speech. While the City relies on *Metromedia* for support, there the plurality simply held that aesthetics *and* traffic safety together were substantial government interests. 453 U.S. at 507-08. Indeed, most courts address these interests in tandem, and most regulations that reply on these purposes cite both as their important governmental interest, such that they are deemed substantial together, not individually. *See, e.g., Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1269 (11th Cir. 2005) ("[T]he stated legislative purpose [(not purposes)] of improving traffic safety and aesthetics."). Some cases have dealt with the issue, but it has not been squarely addressed in the context of *Central Hudson*. For example, then Associate Justice Rehnquist expressed the view that aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community. *Metromedia*, 453 U.S. at 570 (Rehnquist, J., dissenting). In fact, in the closest case on point since then, the Supreme Court held that "[i]t is well settled that the state may legitimately exercise its police powers to advance esthetic values," but there the Court did not engage in a *Central Hudson* analysis. *Taxpayers for Vincent*, 466 U.S. at 805.

While the Court agrees that the Sign Ordinance and the Street Furniture Program superficially appear compatible on the issue of aesthetics,[11] a closer analysis reveals that the Ordinance still does not meet the *Central Hudson* test for the same reasons discussed above. The Sign Ordinance purports to protect the visual environment by eliminating all off-site signs from the City's public rights of way, while the Street Furniture Program simultaneously authorizes thousands of such signs to be posted throughout the City by Viacom. Plaintiff presents graphic evidence of this point in a photograph which compares a Metro Lights sign with a City bus shelter sign with exactly the same

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Thus, the issue seems to remain open, but it is an issue this Court need not decide since even if aesthetics alone is a substantial interest for purposes of *Central Hudson*, the Sign Ordinance nonetheless fails the third and fourth prongs of the test.

[11] For example, the Street Furniture Program provides for the installation and maintenance of public restrooms, kiosks, news racks and transit shelters. Old dilapidated furniture would be replaced; newly constructed furniture would be designed to be aesthetically pleasing and to harmonize with the surrounding neighborhood. In these ways, the Street Furniture Program enhanced aesthetics but by focusing more on what might be described as architectural issues as opposed to matters of communication. While the elimination of old, unsightly benches and kiosks and replacing them with new, architecturally harmonious transit shelters and related structures is a laudable goal, it bears only a tangential relationship to the issue of the impact of commercial signage on the visual environment.

dimensions and the same advertising copy. (Kunzman Decl., Ex. D [Photographs] at 3(a), (b)). Though the signs themselves are indistinguishable, one sign falls within the ban while the other does not. In short, what the City, through its Sign Ordinance, takes away from most commercial enterprises (for the stated purpose of protecting the visual environment), the City grants back to a single advertiser under the Street Furniture Program thereby perpetuating, rather than eliminating, off-site signage throughout the City. Had the City implemented a blanket ban on all off-site signs without the exception for Viacom, Plaintiff admitted at oral argument that such a regulation would be constitutional. However, Plaintiff argues, and the Court agrees, that the facts of this case are materially different.

Again, as in *Greater New Orleans Broad. Ass'n*, the City cannot persuasively argue that its Ordinance complies with *Central Hudson* by directly advancing a substantial governmental interest while the City promulgates other policies that undermine the stated interest. In fact, the immediate effect of the ordinance would likely be to increase net signage since, as noted, the ordinance turns pre-existing signs into legal non-conforming uses not capable of being updated, altered or modified. That these signs can continue to exist without modification or alteration cuts against the City's stated goal of improved aesthetics since the signs are permitted to physically deteriorate without any limitation. This failure to directly advance these interests also relates to the narrowly tailored requirement as discussed *infra*. Thus, the Court concludes that the

undisputed facts set forth in the record before this Court establish that the Sign Ordinance, viewed in context of the City's Street Furniture Program, does not directly advance the City's stated interest in protecting the City's visual environment.

c. Narrowly Tailored

As stated, the fourth prong of the *Central Hudson* test complements the direct advancement inquiry of the third, asking whether the speech restriction is not more extensive than necessary to serve the interests that support it. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. The law only requires that the regulation be narrowly tailored to advance the governmental interests; the regulation does not need to be the least restrictive alternative. Nevertheless, as *Central Hudson* observed, "[t]he regulatory technique may extend only as far as the interest it serves. The State cannot regulate speech that poses no danger to the asserted State interest, nor can it completely suppress information when narrower restrictions on expression would serve its interest as well." 447 U.S. at 565 (citations omitted). Thus, in that case the Court held that a complete ban on advertising by a regulated utility was far broader than necessary to promote equity and efficiency in the establishment of utility rates.

In *Greater New Orleans Broad. Ass'n*, the Supreme Court noted that the fourth prong "complements the direct-advancement inquiry of the third." 527 U.S. at 188. In assessing whether the FCC ban on gambling advertisements satisfied the narrow tailoring requirement, the Court wrote:

> More important, any measure of the effectiveness of the Government's attempt to minimize the social costs of gambling cannot ignore Congress' simultaneous encouragement of tribal casino gambling, which may well be growing at a rate exceeding any increase in gambling or compulsive gambling that private casino advertising could produce.

Id. Indicating that these conflicting policies rendered the FCC's advertising ban unconstitutional under the *Central Hudson* test, and further relying on its precedent in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), the Court concluded:

> There, we considered the effect of conflicting federal policies on the Government's claim that a speech restriction materially advanced its interest in preventing so-called 'strength wars' among competing sellers of certain alcoholic beverages. We concluded that the effect of the challenged restriction on commercial speech had to be evaluated in the context of the entire regulatory scheme, rather than in isolation, and we invalidated the restriction based on the 'overall irrationality of the Government's regulatory scheme.' As in this case, there was 'little chance' that the speech restriction could have directly and materially advanced its aim, 'while other provisions of the same Act directly undermined and counteracted its effects.' Coupled with the availability of other regulatory options which could advance

> the asserted interests 'in a manner less intrusive to [petitioners'] First Amendment rights,' we found that the Government could not satisfy the *Central Hudson* test.

527 U.S. at 192-93 (internal citations omitted) (brackets in original).

The same can be said here, even though the inconsistency and the reasons for its existence are less subtle than those discussed in *Greater New Orleans Broad. Ass'n.* Here the City has placed a blanket ban on the construction and display of off-site signs throughout the City. The law is clear and unequivocal: no one, at no time, may display such signs. When that unambiguous language was written into law, the City had already entered into an agreement with a private company that expressly permitted that company to do what the Ordinance prohibited. The effect of the Ordinance was to grant to one advertising contractor the sole and exclusive right to display advertising on off-site signs throughout the City. And while the Street Furniture Agreement focuses on transit stops and shelter, it is not limited to those locations. For example, Viacom is permitted to display off-site signs in kiosks installed within a foot of the curb line on street corners where no bus stop is located. (Fisher Decl., Ex. B [Photograph of Advertising Copy]). The City cannot persuasively argue that the stated goals of the Sign Ordinance are furthered when its contractor is permitted to install distracting advertising kiosks within a foot of traffic lanes.

The City relies heavily on *Metromedia* in support of its argument that the Sign Ordinance is not fatally

underinclusive despite the exclusion of the Street Furniture Program from the off-site sign ban. 453 U.S. at 511-12. However,, *Metromedia* is distinguishable. In *Metromedia*, the ordinance under scrutiny drew a distinction between off-site and on-site signs *only*, which is the same distinction drawn by the Sign Ordinance at issue here. The Court therefore addressed the question of whether excluding on-site signs from the ordinance undermined its purposes and rendered it so underinclusive that if failed the *Central Hudson* test. The Supreme Court noted that the distinction recognized in the San Diego ordinance had been considered and approved in numerous decisions. *Id.* at 511. Moreover, the Supreme Court held that the City could have a number of good reasons for favoring one classification of signs—those defined as "on-site" signs—over those that fell within the definition of off-site. *Id.* at 511-12.

The situation presented in this case is quite different. The City purports to ban all off-site signs on private property through the Sign Ordinance. But through the Street Furniture Program, the City not only permits but appears to encourage their display on public property throughout Los Angeles. This goes well beyond the scheme addressed in *Metromedia*. The Ordinance and the Street Furniture Program confer on one private contractor a right to do what the City claims all others are prohibited from doing. Thus, unlike the ordinance in *Metromedia* which brought about a complete ban on off-site signs, here the City's Sign Ordinance purports to, but does not, accomplish a complete ban and is instead pierced with a colossal exception.

Metromedia therefore provides no support for the City's position in this case.

The Court agrees with the Sixth Circuit's reasoning in *Discovery Network, Inc. v. Cincinnati*, 946 F.2d 464 (6th Cir. 1991). There, the court noted:

> The ordinance is not narrowly tailored because there are many options available to the city that would address its aesthetic, safety, and proliferation concerns without placing the significant burden on commercial speech that the ordinance does. None of these options would be less effective in promoting the asserted interests than is the complete ban on distribution of commercial handbills.

Id. at 473 (citation omitted). Here, there are also many alternatives. Most obviously, the City could impose the same requirements on other private advertisers as it did on Viacom. That is, the City could require that any advertisements meet certain specifications—including size and location—to promote the City's goals with regard to traffic safety and aesthetics. Such universal restrictions could apply to *all* advertisers instead of banning the speech of all but one City-chosen advertising contractor.

For these reasons, the Court concludes, on the specific facts of this case, that the Sign Ordinance is more extensive than necessary to serve the interests that support it and fails to satisfy the fourth prong of *Central Hudson*.

3. Conclusion Regarding *Central Hudson* Analysis

For the foregoing reasons, the Court concludes that the Sign Ordinance violates the First Amendment to the United States Constitution and is unconstitutional as applied in this case. The Sign Ordinance fails both the third and fourth prongs of *Central Hudson* since together the Sign Ordinance and accompanying exception do not, in a narrowly tailored manner, directly advance the City's interests in traffic safety and aesthetics. Therefore, Plaintiff's motion for summary adjudication on the First Amendment issue is **GRANTED**.

E. Equal Protection[12]

1. Legal Standard

The Equal Protection Clause is implicated when the government draws a classification or distinction between two groups, treating each one differently. Once a classification is deemed to exist, the Court must identify the level of scrutiny to be applied, which will depend on the type of discrimination alleged. *See generally* Chemerinsky, *Constitutional Law* § 9.1.2, at 643-50. Rational basis scrutiny is applied when the discrimination is not based on a suspect classification such as race, national origin, or gender. *Id.* Under this standard, a law will be

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[12] While Plaintiff does not move for summary adjudication on the equal protection issue, the City examines it in its Opposition and also moves for summary adjudication on the claim in its cross-motion for summary judgment. Thus, the Court must decide the issue here.

upheld if it is rationally related to some conceivable, legitimate government purpose. *Id.; see, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988). Thus, the means chosen to accomplish the end must only be rationally related to a conceivable government purpose.

2. ANALYSIS

Rational basis review is the proper standard to apply since there is no suspect or quasi-suspect class involved in this case. Indeed, at oral argument Plaintiff admitted there existed no suspect classification for purposes of the equal protection analysis. The City argues that its regulatory scheme does not violate equal protection because it survives rational basis review, since the Street Furniture Program provides attractive new Street Furniture that both improves aesthetics and provides a more comfortable wait for transit patrons. (Opp. at 18). The Court agrees.

The Sign Ordinance, at least to some degree, is rationally related to the interests of traffic safety and aesthetics because it attempts to prevent new off-site signs (other than new Street Furniture) and decrease visual clutter. For example, the Street Furniture Program, at least in part, replaces aging and dilapidated bus benches and other Street Furniture. (Oishi Decl., Ex. E [Agreement for Coordinated Street Furniture] § 4.3.4). Such replacements are at least rationally related to the goals of aesthetics and improving traffic safety.

Furthermore, over time old signs will be eliminated since they cannot be updated or modified,

and this may result in a net decrease in signage, at least in the long run.

Given this evidence and the evidence presented *supra*, the City has a legitimate purpose for the ban: the goals of increasing traffic safety and improving City aesthetics certainly satisfy the requirements of rational basis review. *See Metromedia*, 453 U.S. at 507-08 (goals advanced by the city to justify the billboard restriction—traffic safety and aesthetics—were "substantial governmental goals").

There exists a critical distinction that allows for the same interests—traffic safety and aesthetics—to support the conclusion that the equal protection claim fails, even though they cannot adequately support the City's argument on the First Amendment issue. On Plaintiff's First Amendment claim, *Central Hudson* requires that the regulation directly advance a substantial government interest in a narrowly tailored fashion. Equal protection jurisprudence involving a non-suspect classification, on the other hand, requires that the law be upheld unless the challenging party can show it is not rationally related to a conceivable government purpose. Under equal protection jurisprudence, there is no requirement that the regulation be the least restrictive alternative or even narrowly tailored. Rather, the regulation must simply be rationally related to some conceivable and legitimate governmental purpose. *See U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) ("Where ... there are plausible reasons for [the government's] action, our inquiry is at an end."); *McGowan v. Maryland*, 366 U.S. 420, 426 (1961) (a regulation "will not be set

aside if any state of facts reasonably may be conceived to justify it"). Therefore, the Court agrees with the City that there is at least some conceivable legitimate purpose for the City's ban and accompanying Street Furniture Program that is rationally related to that purpose, such as the promotion of aesthetics and traffic safety. Thus, the ban does not violate the Equal Protection Clause and, for that reason, the City's cross-motion for summary judgment on this claim is **GRANTED** and judgment on this claim should be entered in favor of the City.

F. City's Sovereign Power To Regulate Its own Property and Private Property

The City claims that it can constitutionally place signs on its own property and still regulate signs on private property in any manner it sees fit, so long as there is a reasonable basis for doing so. (Opp. at 19). It asserts that its ban on off-site signs, applicable only to private property, is a valid exercise of its police power.

The City has presented no authority for the proposition that *Central Hudson* does not apply in the present circumstances and has in fact agreed to its application, (10/31/05 Tr. [Summary Adjudication Hearing] at 21:20-22 ("I agree with the Court that when the dust settles on this case it really does always come back to *Central Hudson*.")), or that the exercise of the City's police powers in some way

supercedes the First Amendment's protections.[13] Instead, in a last ditch effort to save the Sign Ordinance, the City proffers a "parade of horribles"

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[13] *Lehman v. City of* Shaker *Heights*, 418 U.S. 298 (1974) and *Children of the Rosary v. City of Phoenix*, 154 F.3d 972 (9th Cir. 1998), on which the City relies, provide no support for its position. In *Lehman*, the Court dealt with limitations on political messages, but not commercial advertisements on buses. The Court was asked to decide whether advertising space on the bus constituted a public forum under First Amendment jurisprudence, and held that it was not. The Court therefore concluded that the City could preclude political advertising in that location. The Court concluded:

> No First Amendment forum is here to be found. The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.

418 U.S. at 304. In *Children of the Rosary*, this Circuit likewise addressed an advertising law limiting advertising on bus panels to commercial speech. The Circuit affirmed the district court's denial of appellant's motion for a preliminary injunction seeking to advertise the sale of an anti-abortion bumper sticker. The Circuit relied on the fact that bus panels were nonpublic fora and proceeded with that analysis to conclude that there existed no improper viewpoint regulation. 154 F.3d at 982. Here, advertising on bus panels is not at issue. Neither are political or religious advertisements, as was the case there and on which the court seemed to rely. *Id.* Unlike the cited cases, the Sign Ordinance at issue here purports to ban commercial speech, but the ban applies to everyone except a City-chosen contractor, Viacom, which is excepted from the ban. Thus, both cases are distinguishable and no party has argued that the public/nonpublic forum analysis should apply, as the Sign Ordinance and accompanying exception encompass advertising copy located on the public sidewalks *and* on private property.

that granting Plaintiff's motion would have "disastrous nationwide repercussions." (Opp. at 21). The Court rejects the City's plea since the City obviously fails to appreciate the foundation for this Court's ruling, which distinguishes this case from different otherwise similar billboard cases. That is, the City's Sign Ordinance is coupled with a gaping exception for the City's private contractor, thereby eviscerating any chance that the Sign Ordinance can satisfy the constitutional requirements of *Central Hudson*. Since the Court concludes that the Sign Ordinance violates *Central Hudson*, for the reasons discussed *supra*, the Court rejects the City's policy argument.

IV.

CONCLUSION

Plaintiff's motion for summary adjudication on the First Amendment issue is **GRANTED** since the City's Sign Ordinance fails the *Central Hudson* test. The City's cross-motion for summary judgment on the First Amendment issue is **DENIED**, while its motion on Plaintiffs equal protection claim is **GRANTED**.

IT IS SO ORDERED.

Dated: August 11, 2006

/s/
Judge Gary Allen Feess
United States District Court

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No. 09-259

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In The

Supreme Court of the United States

METRO LIGHTS, L.L.C.,
a New York limited liability company,

Petitioner,

v.

CITY OF LOS ANGELES,
a California municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

KENNETH T. FONG,
Deputy City Attorney
Counsel of Record
700 City Hall East,
200 North Main Street
Los Angeles, California
90012-4130
Telephone: 213.978.8064
Facsimile: 213.978.8214
E-Mail:
Kenneth.Fong@lacity.org

CARMEN A. TRUTANICH,
City Attorney
CLAUDIA MCGEE HENRY,
Senior Assistant
City Attorney
JERI L. BURGE,
Assistant City Attorney

Attorneys for Respondent City of Los Angeles

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does this case, which involves facts virtually identical to those in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), tread any new ground that justifies reexamining *Metromedia*?

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STATEMENT OF THE CASE

Factual Background

The City of Los Angeles has a long history of placing advertising signs on public bus benches. Formal agreements granting a private company the right to place such signs on bus benches in exchange for payment to the City began at least as early as 1987, and it would be reasonable to assume that the practice had been common for many decades before that, although formal records of it that early no longer exist. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 902 (9th Cir. 2009).

In 2001, after a public bidding process, the City entered into the most recent of those agreements, the "Coordinated Street Furniture Agreement" with CBS (then known as Viacom Decaux LLC). Two dozen parties submitted bids through this process, but the plaintiff in this case, Metro Lights, was not among them. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927, 932 (C.D. Cal. 2006). Under that agreement, CBS was required to install new bus shelters and make annual payments to the City. The agreement gave CBS exclusive advertising rights on the new public facilities. *Metro Lights*, 551 F.3d at 902.

The City also has a long history of regulating billboards within its borders. For many years, the City had in place time, place and manner regulations for commercial signage in the City. Los Angeles Ordinance No. 173681 (Appendix, App. 1-6). This

regulatory scheme allowed private parties to apply for permits to erect billboards but restricted their size, height, and location.

Over time, it became apparent to the City that these time, place and manner regulations were not adequately controlling the proliferation of billboards in the City. Los Angeles Ordinance No. 173681 (Appendix, App. 1). To address that problem, in December of 2002, the City enacted a ban on all new billboards on private property in the City. Los Angeles Ordinance No. 174547 (Appendix, App. 8-15).

This case concerns a city's right to place advertising signs on its own bus shelters,[1] which are the modern version of bus benches. Metro Lights is alleging that by doing this the City of Los Angeles has undermined the effectiveness of its ban on new billboards[2] so that it violates the First Amendment.

Around December 2003, Metro Lights installed a number of signs on private property in violation of

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[1] The term "bus shelters" will be used in this brief to collectively refer to covered bus benches and other street furniture such as informational kiosks and automated public toilets.

[2] The term "billboard" will be used in this brief to refer to all "offsite commercial signs." Generally speaking, offsite commercial signs advertise goods and services available elsewhere than the site where the sign is located. By contrast, onsite commercial signs advertise goods and services available at the same site where the sign is located.

the ban, the City's response to which was to issue citations. *Id.*

On February 17, 2004, Metro Lights filed suit.

Opinions Below

On January 23, 2007, the district court below invalidated the City's ban on new billboards. That ruling was based on the district court's conclusion that a de facto exception for bus shelter advertising worked at "cross purposes" with the ban causing it to fail this Court's *Central Hudson*[3] test for regulation of commercial speech. *Metro Lights, L.L.C. v. City of Los Angeles*, 488 F. Supp. 2d 927 (C.D. Cal. 2006).

The district court alluded to an economic motive for the City to enact the ban but the district court made no finding that this was the City's true or sole motivation for enacting the ban. Nor did Metro Lights introduce evidence to this effect at the district court level so as to challenge the ban's stated purposes under the second element of the *Central Hudson* test.

On January 6, 2009, the Ninth Circuit reversed. *Metro Lights, L.L.C. v. City of Los Angeles*, 551 F.3d 898, 909 (9th Cir. 2009). The Ninth Circuit explained that in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981), this Court had upheld twelve express exceptions to a

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[3] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

city-wide ban on new billboards, including an exception for "bus bench signs." After recognizing that this exception for bus bench signs was "virtually identical" to Los Angeles' de facto exception for bus shelter signs, under stare decisis the Ninth Circuit followed *Metromedia* and upheld Los Angeles' ban. *Metro Lights*, 551 F.3d at 908.

In upholding the exception for bus shelter signs, the Ninth Circuit relied on the same two primary grounds on which the decision in *Metromedia* rests. The first is recognition that a ban on billboards will continue to satisfy the "direct advancement" element of the *Central Hudson*[4] test even where a city carves out an exception for certain signs, such as onsite signs or, here, for bus shelter signs. *Id.* at 511. Bus shelter signs, being inherently limited in number and size, pose no threat of undermining a ban on billboards

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[4] The *Central Hudson* test is an intermediate scrutiny test developed by this Court that strikes a careful balance between giving the government sufficient latitude to regulate commercial speech and adequately protecting commercial speech. Altering the *Central Hudson* test to provide even more protection to commercial speech will upset this careful balance and turn the test into strict scrutiny or something much closer to it. Such stricter scrutiny should be reserved for political and other noncommercial speech that occupies the highest rung of protection on the First Amendment hierarchy. This Court has already recognized that the great danger of doing this is that it will dilute the protection enjoyed by noncommercial speech. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978).

to the point that it no longer directly advances the government's goals.

The second ground in *Metromedia* that the Ninth Circuit relied on was deference to local land use decisions dealing with signage. *Metromedia* gives a generous amount of deference to cities to decide how to implement local bans on billboards, and an exception for bus shelter signs – which are part of a limited and coordinated public transportation system – qualifies for such deference. *Metro Lights*, 551 F.3d at 908.

The Ninth Circuit panel unanimously voted to deny Metro Lights' request for a rehearing. A request for en banc hearing was also denied.

REASONS FOR DENYING THE PETITION

The practice of this Court has been to allow certiorari only in limited circumstances. None of those circumstances is present in this case and therefore the petition should not be granted.

There is no conflict among the circuits on the legal issue in this case that would justify certiorari. Attempting to manufacture such a conflict, Metro Lights points out that a few circuit courts have questioned whether this Court issued any controlling opinions regarding the regulation of noncommercial speech in *Metromedia*. But Metro Lights fails to identify any controlling opinion made by the *Metromedia* Court over which the circuits are now split,

and which would now justify certiorari. Also, even if there were a conflict over a noncommercial speech issue, that would be irrelevant to the strictly commercial speech issue at play in the instant case. Thus, there is no conflict among the circuits on a legal issue that would justify certiorari.

Because stare decisis required the Ninth Circuit to follow *Metromedia*, Metro Lights' real beef is with that case. But a challenge to *Metromedia* through the instant case is unwarranted for many reasons. First, the instant case treads no new ground making it necessary to revisit *Metromedia*. Second, during the nearly thirty years since *Metromedia* was handed down, this Court has always declined to revisit the decision. Third, overturning *Metromedia* would undo three decades of jurisprudence that has carefully balanced the respective rights of sign companies, local government, and the public. Fourth, despite Metro Lights' claim that the *Metromedia* decision was so splintered that it gave no "binding decision," the truth is that a clear majority of the *Metromedia* Court (composed of a four-Justice plurality and Justice Steven's express joinder with the plurality's commercial speech ruling) did hand down a firm ruling upholding local bans of new billboards, which has been relied on by scores of courts, including the Ninth Circuit here in *Metro Lights*.

Metro Lights argues that this Court's application of the *Central Hudson* test in non-billboard arenas signals a sea change in this Court's application of the *Central Hudson* test that warrants overturning

Metromedia. It does not. The *Central Hudson* test has always been fluid – allowing courts the flexibility to determine whether in any given set of facts a specific regulatory scheme actually furthers the government's interests. Merely because this Court has seen fit to invalidate some regulatory schemes that are wholly futile, does not doom all regulation to the same fate.

Metro Lights also urges this Court to take the case because the economic incentive for the City to impose a ban has not been properly considered. Untrue. The district court made no finding that the City's true or sole motivation for enacting the ban was to generate revenue for the City's own bus shelter signs. Moreover, Metro Lights could have introduced evidence to this effect at the district court level and thereby challenged the ban's stated purposes under the second element of the *Central Hudson* test, but did not. Metro Lights having bypassed that opportunity, this Court should not now infer a motive of which there was no proof or finding below.

Finally, the distinction between public and private property provides an alternative basis for upholding the Ninth Circuit's decision.

For all these reasons, the petition should be denied.

A. There is no conflict among the circuits justifying granting the petition.

A long standing ground for certiorari is the existence of a conflict among the circuits on a specific

legal issue. There is no such conflict among the circuits on the specific legal issue at the heart of the instant case, which is whether a de facto exception to a city's ban on billboards causes the ban to violate the First Amendment. The instant case is thus far the only circuit decision on this issue.

In an attempt to somehow show a conflict among the circuits, Metro Lights points to a few circuit cases where those courts have questioned what it is that this Court said in *Metromedia*.[5] But this questioning is just that, questioning. Metro Lights fails to identify a controlling opinion that was made by the *Metromedia* Court over which those circuits are now split.

Just as significantly, the cases cited by Metro Lights to support this point do not even deal with the commercial speech legal issue central to this case. Instead, these cases deal with *Metromedia's* ruling concerning regulation of noncommercial speech. *See Sotlantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1260 (11th Cir. 2005), "however, both the four-Justice plurality opinion written by Justice White and the two-Justice concurrence written by Justice Brennan concluded that the ordinance's regulation of noncommercial advertising was unconstitutional – although for wholly different reasons."); *Rappa v. New Castle County*, 18 F.3d 1043 (3d Cir. 1994);[6]

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[5] Petition at 11-16.

[6] Metro Lights notes that in *Rappa* the Third Circuit found the *Metromedia* Court's analysis wanting and for that reason

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Discovery Network, Inc. v. City of Cincinnati, 946 F.2d 464 (6th Cir. 1991) (speaking of both *Rappa* and *Discovery Network*, the *Sotlantic* court commented: "Indeed, at least two of our sister Circuits have applied Marks[7] analysis to Metromedia's noncommercial-speech holding and have found no controlling opinion." [the court then cited to *Rappa* and *Discovery Network* as the two "sister Circuits."]). Because these cases deal with noncommercial speech issues, they are irrelevant to the commercial speech issue in the instant case, and thus there is no conflict between those cases and the present one.

"crafted its own First Amendment analysis." (Petition at 12). However, it is telling that in the fifteen years since *Rappa* was handed down no other circuit has adopted the *Rappa* test while scores of courts have continued to follow *Metromedia*.

[7] To determine if a controlling opinion exists, the *O'Dell/Marks* doctrine says that the holding of a majority of the Court can be viewed as that position that reflects the narrowest grounds for agreement among the five Justices that comprise the majority. If no grounds for agreement can be found, there is no majority opinion and no opinion of the Court. *O'Dell v. Netherland*, 521 U.S. 151, 160, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997); *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

B. There is no reason to revisit *Metromedia v. City of San Diego*, which for the past thirty years has served as the bedrock for countless sign cases decided by the lower courts.

There is no valid reason for this Court to revisit *Metromedia*, which has been the leading case on the subject of a ban on billboards for nearly three decades. During that time, scores of lower courts have relied on the case and, by doing so, built a principled line of jurisprudence concerning the regulation of commercial signs. Overturning *Metromedia* is unnecessary and would lead to more, not less, chaos in this area of the law.

As explained above, all the Ninth Circuit did here was comply with stare decisis and follow *Metromedia*, in which this Court issued a directly-on-point ruling upholding a ban on new billboards in spite of an express exception for bus benches. The relevant facts in *Metromedia* and in *Metro Lights* are virtually identical. Both involve city-wide bans on new billboards, and both involve exceptions for advertising signs on city-owned bus benches or their modern equivalent. Because the cases are so similar, *Metro Lights* breaks no new ground and is just another example of a lower court following the well established law laid down in *Metromedia*. No other case has warranted revisiting *Metromedia* in nearly thirty years and this case is no different.

Not only has this Court declined to revisit *Metromedia* during nearly thirty years, this Court, in fact, expressly reaffirmed the case in 1984 in *Members of The City Council of The City of Los Angeles v. Taxpayers for Vincent,*[8] (which involved the defendant here, City of Los Angeles) and, again, in 1994, in *City of Ladue v. Gilleo.*[9] The continuing viability of *Metromedia* has also been recognized by the circuit courts, including the Ninth Circuit in *Ackerley v. Communications of the Northwest Inc. Krochalis*, 108 F.3d 1095 (9th Cir. 1997).

Moreover, during those thirty years, numerous lower federal courts have relied on *Metromedia's* holding dealing with commercial billboards, a sampling of which is: *Clear Channel Outdoor, Inc. v. City*

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[8] 466 U.S. 789, 807, 104 S. Ct. 2118, 2130, 80 L. Ed. 2d 772 (1984) ("We reaffirm the conclusion of the majority in *Metromedia*. The problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit. '[The] city's interest in attempting to preserve [or improve] the quality of urban life is one that must be accorded high respect.'").

[9] 512 U.S. 43, 49, 114 S. Ct. 2038, 2042, 129 L. Ed. 2d 36, 43 (1994) ("In *Metromedia*, we reviewed an ordinance imposing substantial prohibitions on outdoor advertising displays within the city of San Diego in the interest of traffic safety and esthetics. The ordinance generally banned all except those advertising 'on-site' activities. The Court concluded that the city's interest in traffic safety and its esthetic interest in preventing 'visual clutter' could justify a prohibition of offsite commercial billboards even though similar on-site signs were allowed.") (notes omitted).

of L.A., 340 F.3d 810 (9th Cir. 2003); *Onsite Adver. Servs. LLC v. City of Seattle*, 36 Fed. Appx. 332 (2002); *One World One Family Now v. City & County of Honolulu*, 76 F.3d 1009 (9th Cir. 1996); *Ackerley Communications*, 108 F.3d 1095); *Advanced Outdoor v. County of San Diego*, 64 F.3d 666 (9th Cir. 1995); *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993); *National Adver. Co. v. Orange*, 861 F.2d 246 (9th Cir. 1988).

The state courts too have relied on *Metromedia*, including: *Ex parte Walter*, 829 So. 2d 186 (Ala. 2002); *City of Salinas v. Ryan Outdoor Adver., Inc.*, 189 Cal. App. 3d 416 (Cal. 1987); *Burns v. Barrett*, 561 A.2d 1378 (Conn. 1989); *City of Sunrise v. D.C.A. Homes, Inc.*, 421 So. 2d 1084 (Fla. Dist. Ct. App. 1982); *City of Lake Wales v. Lamar Adver. Ass'n*, 414 So. 2d 1030 (Fla. 1982); *Cafe Erotica v. Florida Dep't of Transp.*, 830 So. 2d 181 (Fla. Dist. Ct. App. 2002); *Dep't of Transp. v. Shiflett*, 310 S.E.2d 509 (Ga. 1984); *National Adver. Co. v. Vill. of Downers Grove*, 561 N.E.2d 1300 (Ill. App. Ct. 1990); *Immaculate Conception Corp. v. Iowa Dep't of Transp.*, 656 N.W.2d 513 (Iowa 2003); *Maurice Callahan & Sons, Inc. v. Outdoor Adver. Bd.*, 427 N.E.2d 25 (Mass. App. Ct. 1981); *State v. Hopf*, 323 N.W.2d 746 (Minn. 1982); *City of Cottage Grove v. Ott*, 395 N.W.2d 111 (Minn. Ct. App. 1986); *Gannett Outdoor Co. of Michigan v. City of Troy*, 409 N.W.2d 719 (Mich. Ct. App. 1986); *City of Rochester Hills v. Schulz*, 592 N.W.2d 69 (Mich. 1999); *Town of Carmel v. Suburban Outdoor Adver. Co.*, 514 N.Y.S.2d 387 (App. Div. 1987); *Penn Adver.*,

Inc. v. City of Buffalo, 613 N.Y.S.2d 84, 86 (App. Div. 1994); *R. O. Givens, Inc. v. Town of Nags Head*, 294 S.E.2d 388 (N.C. Ct. App. 1982); *Genesis Outdoor Inc. v. Vill. of Cuyahoga Heights*, 2002 Ohio 2141 (Ct. App. 2002); *Atlantic Ref. and Mktg. Corp. v. Bd. of Comm'rs of York Tw.*, 608 A.2d 592 (Pa. Commw. Ct. 1992); *Kasha v. Dep't of Transp.*, 782 A.2d 15 (Pa. Commw. Ct. 2001); *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49 (Tenn. Ct. App. 2004); *Eller Media Co. v. City of Houston*, 101 S.W.3d 668 (Tex. App. 2003); *Town of New Mkt. v. Battlefield Enters., Inc.*, 8 Va. Cir. 96 (Va. Cir. Ct. 1984).

Nor has *Metromedia* been overruled by the various non-billboard *Central Hudson* cases relied upon by Metro Lights.[10] (Petition at 18-21). *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999),[11] is distinguishable because it dealt with a

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[10] The Ninth Circuit correctly recognized that those other Supreme Court underinclusivity cases do not deal with the "law of billboards" which remains the exclusive province of *Metromedia*. *Metro Lights*, 551 F.3d at 911. Metro Lights argues that the Ninth Circuit applied an "entirely different analytical framework" than those other underinclusivity cases. (Petition at 20 n.2). Untrue. All of the cases, including *Metromedia* and *Metro Lights*, use the same analytical framework consisting of the four-part *Central Hudson* test.

[11] The *Greater New Orleans* decision was cast in the mold of an earlier case, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995) that involved a federal law that prohibited beer labels from showing alcohol content but allowed advertisements for beer to show such information and

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statutory scheme that had virtually no chance of furthering the government's objective of reducing the number of compulsive gamblers – in the Court's view the government's simultaneous encouragement of advertising for Indian casinos while banning advertising for private casinos simply canceled each other out and re-directed gamblers from one venue to the other. By contrast, here the de facto exception for bus shelter signs does *not* cause a ban to lose virtually all effectiveness in furthering the goals of improving aesthetics and traffic safety. *Metro Lights,* 551 F.3d at 905-06.

City of Cincinnati v. Discovery Network, 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993), is distinguishable because there this Court found that the key feature of the statutory scheme, which was a distinction between commercial and noncommercial newsracks, lacked any logical connection to furthering Cincinnati's interest in aesthetics and sidewalk safety, and thus the statutory scheme failed the *Central Hudson* test. By contrast, here, the perceived exception is a limited and controlled series of transit furniture signs limited to public rights-of-way that will not undermine the ban's furtherance of Los Angeles' goals and for that reason Los Angeles'

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allowed wine labels to include it. That law worked at such cross purposes that, like the law in *Greater New Orleans*, it had little or no chance of furthering the government's objectives behind the law, and on that basis can also be distinguished from Los Angeles' ban.

statutory scheme satisfies the *Central Hudson* test. *Metro Lights*, 551 F.3d at 905.[12] *See also Ackerley Communications of the Northwest Inc. v. Krochalis*, 108 F.3d 1095, 1099 (9th Cir. 1997) (pointing out that this Court has never said that *Central Hudson* cases outside of the billboard arena have undermined *Metromedia* and that this Court has continued to rely on *Metromedia*.).

Metro Lights suggests that the Ninth Circuit's naked observation that there "may seem to be some tension" between this Court's more recent cases applying the *Central Hudson* test and *Metromedia* is an open invitation to this Court to revisit that case. (Petition at 19); *id.* at 908. Not so. The Ninth Circuit's observation should not be taken for more than it is. The observation simply recognizes that the ultimate holdings in *Metromedia* and those other cases differed. The analysis under the third part of the *Central Hudson* test has always been fluid, fact-specific, and dependent on degree. Just because this Court has seen fit to strike down a few regulatory

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[12] Metro Lights also argues, based on discussion in *Discovery Network*, that where governmental regulation does not relate to the commercial nature of commercial speech the regulation should be subject to review under standards applicable to "fully protected speech." (Petition at 18-19). This argument lacks merit because there is no practical way to make this distinction. Any regulation imposed on a sign structure used to display commercial messages necessarily affects the commercial content of those messages. Therefore, the standard of review for regulations of commercial speech should continue to apply.

schemes as ultimately ineffectual does not indicate abandonment of a nuanced analysis that allows courts to in some cases uphold regulations of commercial speech and in other cases strike it down.

To bolster its request to revisit *Metromedia*, Metro Lights portrays the case as failing to produce any binding law to guide subsequent courts. (Petition at 11, 15). This portrayal is flawed. The *Metromedia* Court *did* produce binding law. Pertinent to this litigation, a majority of that Court, comprised of the four-Justice plurality and Justice Stevens's dissent, expressly ruled that a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment.[13] It was this ruling that the Ninth Circuit panel relied on in *Metro Lights*.

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[13] *Id.* at 512: "Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted. . . . In sum, insofar as it regulates commercial speech the San Diego ordinance meets the constitutional requirements of Central Hudson, supra." (plurality opinion by Justice White and joined by Justices Stewart, Marshall, and Powell); *id.* at 541: "The plurality first holds that a total prohibition of the use of 'outdoor advertising display signs' for commercial messages, other than those identifying or promoting a business located on the same premises as the sign, is permissible. I agree with the conclusion that the constitutionality of this prohibition is not undercut by the distinction San Diego has drawn between onsite and offsite commercial signs . . . and I therefore join Parts I through IV of JUSTICE WHITE'S opinion." (Stevens, J., dissenting). While Chief Justice Burger and Justice Rehnquist, who each dissented,

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To divert this Court's attention from the central issue in this case – which is whether Los Angeles' ban on offsite signs satisfies *Central Hudson's* direct advancement element – Metro Lights asserts that the economic motive for the City has not been properly considered by this Court (Petition at 26) and amicus joins the fray. (Brief of Amici Curiae Atlantic Outdoor Advertising, Inc. and Willow Media, LLC at 9).

This is untrue. The existing standard, the *Central Hudson* test, already protects against such potential self-interest. If a sign company suspects that the true and sole purpose of a ban is to benefit the city's economic interests, and not to improve aesthetics and traffic safety, the sign company is always free to argue that the second element of the *Central Hudson* test (which requires that there be a substantial governmental purpose behind the ban) has not been satisfied and submit supporting evidence to that effect.

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did not expressly join in Part VI of the plurality's opinion as did Justice Stevens, they did not disagree with it, thereby impliedly agreeing with it. *City of Ladue v. Gilleo*, 512 U.S. 43, 49 n.8, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) ("Five Members of the Court joined Part IV of Justice White's opinion, which approved of the city's decision to prohibit off-site commercial billboards while permitting on-site billboards. None of the three dissenters disagreed with Part IV. *See* 453 U.S. at 541 (Stevens, J., dissenting in part) (expressly joining Part IV); *id.* at 564-565 (Burger, C. J., dissenting); *id.* at 570 (Rehnquist, J., dissenting)").

As explained in the earlier "Opinions Below" section, Metro Lights never submitted evidence showing that the sole motivation for the City's enactment of the ban was economic, nor did the district court make a finding to this effect.

Amicus also tries to analogize the City's ban to case law where courts, on due process grounds, have kept adjudicatory bodies from deciding matters in which they have a financial stake. (Amicus brief at 8-9). This comparison is inapt. The due process clause, which provides protection against the government depriving an individual of its property rights, does not apply to legislative action, the reason being that legislation applies broadly to all future cases and does not single out any one person's property rights. *Horn v. County of Ventura*, 24 Cal. 3d 605, 616, 156 Cal. Rptr. 718 (1979). For that reason, the due process bias cases cited by amicus have no application to the City's ban, which is a pure legislative act.

For all these reasons, there is no need to revisit or overturn *Metromedia*.

C. The fact that the ban, as a matter of law, does not apply to signs on public property provides an alternative rationale for the Ninth Circuit's decision.

Another reason for denying the petition is the availability of an alternative ground to uphold the

Ninth Circuit's ruling.[14] *See Sanson Hosiery Mills v. NLRB*, 344 U.S. 863, 735 S. Ct. 103, 97 L. Ed. 669 (1952). This alternative rationale relies on the inherent distinction between public and private property, and the different roles government plays with respect to each.

With respect to publicly-owned streets and sidewalks, the government acts in the roles of owner and caretaker, and in those roles must carefully balance a number of competing interests, including use of the streets for travel and free speech. *See, e.g., Sanctity of Human Life Network v. Cal. Highway Patrol*, 105 Cal. App. 4th 858, 870, 129 Cal. Rptr. 2d 708, 716 (2003) (state can restrict citizens from holding signs

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[14] There is another alternative ground for upholding the Ninth Circuit's ruling, but based on an equal protection rather than First Amendment analysis. In situations such as this that involve both free speech and differential treatment among classes of speakers, some courts have concluded that the more appropriate analysis is under equal protection rather than the First Amendment. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). Under facts analogous to those here, equal protection principles have been applied where a city-wide ban on billboards exempted advertising signs on a city-owned sports stadium. The court applied a rational basis equal protection test after noting that there was no fundamental free speech right involved, which may have been because the speech was purely commercial in nature. After concluding that the regulatory scheme passed the rational basis test because the exemption for the signs on the sports stadium was discrete and reasonable under the circumstances, the court upheld the ban. *MBC Realty, LLC v. Mayor and City Council of Baltimore*, 351 F. Supp. 2d 420, 425 (D. Md. 2005).

over freeway overpasses during rush hour in order to preserve "free flow of traffic"). With respect to private property, the government acts as regulator under authority of its police power. *See, e.g., G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064 (9th Cir. 2006).

These different roles have led to two lines of First Amendment jurisprudence. Where government is acting in its role as owner of public property, the case law focuses on whether the public property is a public forum or not. Bus shelters are not. *See, e.g., Uptown Pawn & Jewelry, Inc. v. City of Hollywood*, 337 F.3d 1275, 1278-79 (11th Cir. 2003). Further, it is a long standing principle that when government acts as a proprietor to manage its internal operations, as opposed to exercising its power as regulator, those proprietary actions are subject to a lower level of First Amendment scrutiny. *United States v. Kokinda*, 497 U.S. 720, 725, 110 S. Ct. 3115, 3119, 111 L. Ed. 2d 571, 580 (1990); *Children of the Rosary v. City of Phoenix*, 526 U.S. 1131, 119 S. Ct. 1804, 143 L. Ed. 2d 1008 (1999). By contrast, where government is acting in its role as regulator of private property, the government's actions are subject to a higher level of scrutiny. This review takes into account such factors as whether or not the restrictions are content-based and whether the restrictions are limited to time, place and manner considerations. *See, e.g., Metromedia*, 453 U.S. 490 (1981).

Because these different lines of First Amendment jurisprudence arise out of the fundamental distinction

between public and private property, that distinction cannot be ignored. The significance of this distinction has been most recently affirmed by this Court in *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009). In that case, this Court found that a city that was already displaying a monument to the Ten Commandments in a city park had no obligation under the First Amendment to provide space for other groups' religious monuments. In so finding, the Court explained that the government's own expressive activity is not subject to the First Amendment, and that only the government's regulation of private speech is. *Id.* at 1130 ("*The Free Speech Clause* restricts government regulation of private speech; it does not regulate government speech.").

Applying this doctrine here[15] means that Los Angeles' own bus shelter signs, which are governmental speech, will not be subject to the First Amendment. In fact, this is already reflected in the fact that signs in the public right-of-way are expressly outside the scope of Los Angeles' ban.[16] Therefore, the bus

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[15] There is even greater reason to apply the doctrine here than in *Summum* because, unlike in that case, the facts here deal exclusively with commercial speech, which this Court has deemed not deserving of as high a level of protection as political and other noncommercial speech. *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779-80, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

[16] This fact is reflected in LAMC § 91.101.4 (Building Code, of which Sign Ordinance is a part, applies only to private

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shelter signs should not be considered at all when analyzing the constitutionality of the ban.

Viewed in this light, the ban is a flat ban because it applies equally to all billboards on private property. A flat ban easily satisfies the *Central Hudson* test and, in particular, the third element of that test that requires that the regulation "directly advance" the government's stated objectives. *Metro Lights*, 551 F.3d at 909 ("Indeed, its counsel, at oral argument, conceded that *Metromedia* 'probably would' control without the SFA [Street Furniture Agreement].").

This alternative rationale thus amply supports the Ninth Circuit's decision, making it unnecessary for this Court to reach the legal issues raised by the petition.

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property and expressly excludes structures in public right-of-way). (Appendix, App. 17).

CONCLUSION

For all these reasons, the Court should deny the petition.

Dated: November 16, 2009

Respectfully submitted,

KENNETH T. FONG,
Deputy City Attorney
Counsel of Record
700 City Hall East,
200 North Main Street
Los Angeles, California 90012-4130
Telephone: 213.978.8064
Facsimile: 213.978.8214
E-Mail: Kenneth.Fong@lacity.org

CARMEN A. TRUTANICH,
City Attorney
CLAUDIA MCGEE HENRY,
Senior Assistant City Attorney
JERI L. BURGE,
Assistant City Attorney

Attorneys for Respondent
City of Los Angeles

ORDINANCE NO. 173681

An ordinance imposing interim regulations on the issuance of building permits for Off-Site signs.

WHEREAS, on October 24, 2000, the City Council adopted a motion to create a Sign Task Force to undertake a comprehensive review of the existing sign ordinance, and formulate recommendations for updating the ordinance; and

WHEREAS, the City's current sign ordinance has been in effect for many years, and in spite of periodic revisions, there have been changes and advancements in the sign industry that were not anticipated and are still not addressed in the ordinance; and

WHEREAS, several motion have recently been introduced requesting Interim Control Ordinances to prohibit the placement of various new Off-Site signs; and

WHEREAS, without the Ordinance, the proliferation of new billboards is likely to negate the effectiveness of updated ordinance standards; and

WHEREAS, the proliferation of billboards (Off-Site signs) in the City of Los Angeles has served as a blighting influence in many areas of the City and has adversely and significantly affected the visual quality of areas through out the City; and

WHEREAS, it is to the benefit of the general welfare of the City that this proliferation of billboards

be curbed or eliminated therefore minimizing to the extent feasible visual blight upon the City's neighborhoods and blighted communities; and

WHEREAS, the City is preparing a citywide ordinance which would ban the construction of new billboards in many areas of the City and provide for removal of a large number of billboards which is conceptually supported by the public, the City Council and the sign industry; and

WHEREAS, City staff, working with representatives of the sign industry in developing the proposed ordinance, contemplate that the development of a permanent ordinance will take about 180 days from drafting to full enactment by the City; and

WHEREAS, there already have been a significant number of applications for new billboards filled with the Department of Building in Safety which, when approved according to existing law, would circumvent and defeat the purposes of the proposed legislation and the clear will of the people; and

WHEREAS, it is necessary to halt the continued proliferation of new billboards until permanent regulations can be enacted and put into place so the adverse affects of these new signs can be minimized or eliminated; and

WHEREAS, the City Council has determined that in order to address these concerns, it is necessary and appropriate that an interim control ordinance be enacted prohibiting the issuance of new

permits for billboards until such time as a new ordinance can be developed, fully considered by the affected parties and the public, heard and or considered by the City Planning Commission, the City Council and the Mayor; and

WHEREAS, Objective 5.5 of the Citywide General Plan Framework states "Enhance the livability of all neighborhoods by upgrading the quality of development and improving the quality of the public realm"; and

WHEREAS, Goal 5A of the Citywide General Plan Framework states "A liveable City for existing and future residents and one that is attractive to future investment"; and

WHEREAS, Policy 5.8.4 of the Citywide General Plan Framework states "Encourage that signage be designed to be integrated with the architectural character of the buildings and convey a visually attractive character."

NOW THEREFORE,

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. DEFINITIONS. Words and phrases shall be construed as defined in Sections 12.03 and 91.6203 of the Los Angeles Municipal Code, if defined therein.

Sec. 2. PROHIBITION. Notwithstanding any provisions of the Los Angeles Municipal Code to the

contrary, for a period of 180 days from the effective date of this Ordinance, with two possible 180-day extensions, or until a permanent ordinance is adopted which amends the citywide provisions governing Off-Site signs, whichever occurs first:

No building permit for either the construction or placement of any new Off-Site sign or an increase in square footage or dimensions of an existing Off-Site sign shall be issued.

Sec. 3. EXCEPTIONS. The prohibition specified in Section 2 of this Ordinance shall not apply to the issuance of any building permit for any Off-Site sign:

1. In order to comply with an order issued by the Department of Building and Safety to repair, remove or demolish an unsafe or a substandard condition with respect to any Off-Site sign.

2. In order to replace any Off-Site sign damaged as a result of fire, earthquake, or other natural disaster, provided that the replacement is not prohibited by any provision of the Los Angeles Municipal Code.

Sec. 4. EXTENSION OF REGULATIONS. The City Council may, by resolution, extend the provisions of this Ordinance for two additional periods, not to exceed 180 days each, so long as the City Council makes the following finding: That appropriate City agencies and officials are exercising due diligence to

assure that the subject ordinance is being expeditiously processed.

Sec. 5. HARDSHIP EXEMPTIONS. The City Council, acting in its legislative capacity and by resolution, may grant hardship exemptions from any or all of the provisions of this Ordinance in cases of extreme hardship duly established to the satisfaction of the City Council.

An application for hardship exemption shall be filed with the City Clerk, on forms provided by the Department of City Planning.

Sec. 6. SEVERABILITY. If any provision of this Ordinance is found to be unconstitutional or otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect the remaining provisions of this Ordinance which can be implemented without the invalid provision and, to this end, the provisions of this Ordinance are declared to be severable.

Sec. 7. APPLICABILITY OF THE ZONING CODE. The regulations of this Ordinance are in addition to those set forth in the planning and zoning provisions of Chapter 1 of the Los Angeles Municipal Code and any other ordinances adopted by the City Council and do not contain any rights otherwise granted under the provisions and procedures contained in that Chapter or other ordinance.

Sec. 8. URGENCY CLAUSE. The City Council finds and declares that this Ordinance is required for

the immediate preservation of the public peace, health and safety for the following reasons. This Ordinance is necessary to prevent irreversible development from occurring pending adoption of a permanent ordinance by preventing the construction and placement of signage that would add to visual blight in the City and possibly undermine the recommendations of the Sign Task Force. In addition, this ordinance is needed to protect the health and safety of citizens of Los Angeles by limiting the potential for traffic conflicts caused by motorists who are distracted by billboards on heavily traveled thoroughfares. Therefore, this Ordinance shall become effective upon publication pursuant to Los Angeles City Charter Section 253.

Sec. 9. The City Clerk shall certify to the passage of this ordinance and cause it to be published in some daily newspaper printed and published in the City of Los Angeles.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles, by a vote of **not less than three-fourths** of all its members, at its meeting of DEC 01 2000.

J. MICHAEL CAREY, City Clerk

By /s/ Konrad Carter
Deputy

Approved DEC 12 2000

/s/ [Illegible]
Mayor

Approved as to Form
and Legality

James K. Hahn,
City Attorney

Pursuant to Charter Section 559, I approve this ordinance and recommend its adoption on behalf of the City Planning Commission . . . . . November, 2000 see attached report.

/s/ Con Howe
Con Howe
Director of Planning

By
Sharon Siedorf Cardenas
Assistant City Attorney

File No. CF00-2078

ORDINANCE NO. 174547

An ordinance amending Sections 12.21 and 91.6205.11 of the Los Angeles Municipal Code relating to signs.

THE PEOPLE OF THE CITY OF LOS ANGELES DO ORDAIN AS FOLLOWS:

Section 1. Subdivision 7 of Subsection A of Section 12.21 of the Los Angeles Municipal Code is amended as follows:

7. No nameplate, sign or advertising matter of any kind shall be placed or maintained on any lot in any zone except in accordance with the following regulations:

(a) All nameplates, signs and advertising matter on a lot in an "A" or "R" Zone shall pertain to a permitted use (except that no signs shall be permitted to identify a home occupation) or indicate the name of the occupant and shall be located on the same lot with that use;

(b) No nameplate, sign or advertising matter, which is attached to a building on a lot in an "A" or "R" Zone, may project above the roof ridge or parapet wall (whichever is the higher) of the building;

(c) No illuminated nameplate, identification sign or advertising matter, which is permitted by this subdivision, may be of the flashing, moving or animated type;

(d) There may be only one unlighted nameplate for each dwelling unit on a lot in an "A" or "R" Zone indicating the name of the occupant, (except that no signs shall be permitted to identify a home occupation), and no nameplate may exceed three square feet in area in an "A" Zone, nor exceed one and one-half square feet in area in an "R" Zone;

(e) There may be one or more unlighted signs pertaining to the sale of farm products raised or produced on the premises, but the total area of all these signs shall not exceed 20 square feet on any lot in an "A" Zone, nor exceed 12 feet on any lot in an "R" Zone;

(f) There may be one or more unlighted signs pertaining to the prospective rental or sale of the property, but the total area of all these signs shall not exceed 20 square feet on any lot in an "A" Zone, nor exceed 12 square feet on any lot in an "R" Zone;

(g) There may be one identification sign for each farm, ranch, estate or building other than a dwelling in an "A" Zone, but that identification sign may not exceed 20 square feet in area;

(h) There may be one or more signs identifying the buildings or permitted use (except that no signs shall be permitted to identify a home occupation) on any lot in any "R" Zone, but no one sign may have a surface area which exceeds 20 square feet, nor shall

the total surface area of all these signs exceed 30 square feet;

(i) There may be one church bulletin board, not exceeding 18 square feet in area, on any lot in any "A" or "R" Zone;

(j) There may be one or more signs, warning against trespassing, on any lot in an "A" Zone, but no one sign shall exceed three square feet in area.

(k) Temporary Subdivision Directional Signs. Notwithstanding any other provision of this article, a Zoning Administrator may approve the use of any property in an "A" or "R" Zone for the erection and maintenance of temporary unlighted subdivision directional signs, which are neither reflective nor fluorescent, if he or she finds that the location of the signs is proper in relation to uses of adjacent property and that the use will not be materially detrimental to the property of other persons located in that vicinity. This approval shall be subject to the following regulations:

(1) An application shall be filed in the Office of Zoning Administration upon a form and accompanied by the data and information as has been prescribed by the Office. Each application shall be consented to and acknowledged by the owner or lessee of each parcel of property upon which a sign is to erected. Only one application need be filed for all temporary, unlighted, subdivision directional signs

relating to a single subdivision separately numbered and recorded by the Los Angeles County Recorder. The manner of installation and conditions regulating number, size and type of signs shall be determined and approved by a Zoning Administrator. To the extent possible, he or she shall make available a list or explanation of those installation features and conditions that are usually required.

(2) An approval to erect and maintain signs pursuant to this paragraph shall be valid for one year. If, after one year, ¾ of the dwelling units or lots have not been sold or leased for the first time, approval for retaining the directional signs for not more than an additional one-year period may be granted by a Zoning Administrator.

(3) No sign erected pursuant to this paragraph shall exceed 12 square feet in area.

(4) One temporary, unlighted, subdivision directional sign may be approved for location adjacent to each street which constitutes a separate and distinct direction on the route from a major or secondary highway to a subdivision site. Where there are two or more major or secondary highways from which there are routes to a subdivision

site, signs may be approved only along two routes.

(5) The erection and maintenance of temporary, unlighted, subdivision directional signs may be approved only on vacant property; however, if a Zoning Administrator determines that vacant property is not available in locations where provisions for travel directions are essential, he or she may approve developed property for the location of signs.

(6) Signs may not be located within the public right-of-way of any highway, street, alley, or on any other public right-of-way.

(7) All signs permitted by this paragraph shall be removed within five days after the expiration of the authorized time period. Each application shall contain a statement signed by the applicant, the owner of the signs, and the owner or lessee of the property upon which the signs are to be placed, agreeing that if the signs are not removed as required above, they may be confiscated, removed and destroyed by the City without further notice. Prior to the erection of any signs authorized pursuant to any single application, the applicant shall deposit $100 with the Department of Building and Safety for the purposes of defraying any expense

incurred by the City in the removal of the signs. This money shall be refunded on the expiration of the prescribed time period if all of the signs have been removed by the applicant, the owner of the signs, or the owner and the lessee of the property where the signs are placed.

(8) Any sign erected pursuant to these regulations may be used only for the purpose of providing necessary travel direction to a subdivision development located in the City of Los Angeles, and must include the name of the owner, the City Planning Department file number, and the expiration date of the approval period. The sign may contain the name of the land development project to which it pertains, including a characteristic trademark or other identifying insignia. The content of each sign shall be subject to approval by a Zoning Administrator.

(9) The approval of temporary subdivision directional signs pursuant to these regulations does not release the applicant from the responsibilities of complying with any provisions of the Los Angeles Municipal Code pertaining to building permit requirements or any other provisions of the Code regulating signs.

(10) Appeals. Appeals from a determination by a Zoning Administrator may be taken to the Area Planning

Commission in the manner prescribed in Section 12.24 l.

(l) Off-site signs. No off-site sign shall be allowed in any zone, except when off-site signs are specifically permitted pursuant to a legally adopted specific plan, supplemental use district or an approved development agreement. Further, that legally permitted existing signs shall not be altered or enlarged.

Sec. 2. Section 91.6205.11 of the Los Angeles Municipal Code is hereby amended by adding a new subsection 11 to read:

11. Are off-site signs, except when off-site signs are specifically permitted pursuant to a variance, legally adopted specific plan, supplemental use district or an approved development agreement. This shall also apply to alterations or enlargements of legally existing off-site signs.

Sec. 3. The City Clerk shall certify to the passage of this ordinance and have it published in accordance with Council policy, either in a daily newspaper circulated in the City of Los Angeles or by posting for ten days in three public places in the City of Los Angeles: one copy on the bulletin board located in the Main Street lobby to the City Hall; one copy on the bulletin board located at the ground level at the Los Angeles Street entrance to the Los Angeles Police Department; and one copy on the bulletin board located at the Temple Street entrance to the Los Angeles County Hall of Records.

I hereby certify that this ordinance was passed by the Council of the City of Los Angeles, at its meeting of APR 30 2002.

J. MICHAEL CAREY, City Clerk

By /s/ Konrad Carter
Deputy
KONRAD CARTER

Approved MAY 7 2002

/s/ James K. Hahn
Mayor

Approved as to Form and Legality

MAR 29 2002
ROCKARD J. DELGADILLO,
City Attorney

Pursuant to Charter Section 559, I approve this ordinance and recommend its adoption on behalf of the City Planning Commission . . . . . .

March 28, 2002

see attached report.

/s/ Con Howe
Con Howe
Director of Planning

By Sharon Siedorf Cardenas
SHARON SIEDORF CARDENAS
Assistant City Attorney

File Nos. C.F. 00-2254 and 02-0138; CPC 2002-461 CA

ARTICLE 1, DIVISION 1
ADMINISTRATION

Section

91.101 Title, Purpose, and Scope.
91.102 Unsafe Buildings or Structures.
91.103 Violations.
91.104 Organization and Enforcement.
91.105 Appeals.
91.106 Permits.
91.107 Fees.
91.108 Inspection.
91.109 Certificate of Occupancy.
91.110 Responsibility of Permittee.
91.111 Code Revision.
91.112 Grading Certificate.

SEC. 91.101. TITLE, PURPOSE, AND SCOPE.

91.101.1. Title. This article shall be known as the **Los Angeles Building Code** or **Building Code** or **LABC**, a portion of the Los Angeles Municipal Code (LAMC), and wherever the word **Code** is used in this article it shall mean the **Los Angeles Building Code**. The Los Angeles Building Code adopts by reference portions of the California Building Code (CBC). **(Amended by Ord. No. 180,619, Eff. 5/12/09.)**

91.101.2. Purpose. The purpose of this article is to safeguard life, limb, health, property and public welfare by regulating and controlling the design, construction, quality of materials, use and occupancy, location and maintenance of all buildings and

structures erected or to be erected within the city, and by regulating certain grading operations within the city.

91.101.3. Reserved.

91.101.4. Scope. (Amended by Ord. No. 180,619, Eff. 5/12/09.) The provisions of this Code shall apply to the construction, alteration, moving, demolition, repair, maintenance and use of any building or structure within this jurisdiction; except work located primarily in a public way, public utility towers and poles, mechanical equipment not specifically regulated in this Code, and hydraulic flood control structures.

For additions, alterations, moving and maintenance of buildings and structures, see Division 34. For temporary buildings and structures, see CBC Section 3103.

Where, in any specific case, different sections of this Code specify different materials, methods of construction or other requirements, the most restrictive shall govern. Where there is a conflict between a general requirement and a specific requirement, the specific requirement shall be applicable.

The codes and standards referenced in this Code shall be considered part of the requirements of this Code to the prescribed extent of each reference. Where differences occur between provisions of this Code and referenced codes and standards, the provisions of this Code shall apply.

Wherever in this Code reference is made to an appendix, the provisions in the appendix shall not apply unless specifically adopted.

The metric conversions are provided in parenthesis following the English units. Where industry has made metric conversions available, the conversions conform to current industry standards. Formulas are also provided with metric equivalents. Metric equivalent formulas immediately follow the English formula and are denoted by "For SI" preceding the metric equivalent. Some formulas do not use dimensions and, thus, are not provided with a metric equivalent. Multiplying conversion factors have been provided for formulas where metric forms were unavailable. Tables are provided with multiplying conversion factors in subheadings for each tabulated units measurement.

91.101.5. Work Not in Scope. The provisions of this Code shall not apply to any of the following:

1. A building accessory to a dwelling and not located in Fire District No. 1 provided the building is not more than 64 square feet in area or 8 feet in height and does not contain any heating, plumbing or electrical installation, and is located as permitted by the Los Angeles Zoning Code. **(Amended by Ord. No. 180,619, Eff. 5/12/09.)**

Supreme Court, U.S.
FILED
NOV 23 2009
OFFICE OF THE CLERK

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(4)

No. 09-259

IN THE

Supreme Court of the United States

METRO LIGHTS, L.L.C.,

Petitioner,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

CHRISTOPHER LANDAU, P.C.
Counsel of Record
LAURA ALEXANDER
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5087

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INTRODUCTION

For the past generation, the law governing First Amendment constraints on commercial sign regulations has existed in a state of suspended animation. This Court's splintered decision in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), produced, as then-Justice Rehnquist foresaw, "a virtual Tower of Babel, from which no definitive principles can be clearly drawn," *id.* at 569 (dissenting opinion). As explained in the petition, the lower courts have struggled mightily over the years to discern what governing legal principles, if any, can be drawn from *Metromedia*, *see, e.g.*, *Rappa v. New Castle County*, 18 F.3d 1043, 1061 n.28 (3d Cir. 1994) (Becker, C.J., joined by Alito, J.) (expressing the "hope" that this Court will "clarify and rectify the problems created by its splintered opinion in *Metromedia*"), and this Court's subsequent commercial speech cases are, to say the least, "in significant tension" with the *Metromedia* plurality decision, *id.* at 1065 n.35; *see also* Pet. App. 19a, 27a.

Respondent Los Angeles, however, insists that *Metromedia* produced a "clear majority" ruling categorically allowing local governments to ban commercial signs either entirely or selectively without raising any First Amendment concerns. Opp. 8; *see also id.* at 16. If anything, that assertion only underscores why certiorari is warranted. Putting aside the fact that there was no "clear majority" in *Metromedia*, and that Los Angeles asserts otherwise only by adding Justice Stevens' *dissenting* vote to the plurality, Los Angeles' characterization of *Metromedia* would put that case at odds with settled commercial speech doctrine. If

indeed *Metromedia* categorically rejected any underinclusivity analysis in the context of commercial sign regulations, then the case cannot be squared with this Court's subsequent commercial speech jurisprudence. *See, e.g.*, *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173 (1999); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Los Angeles does not deny this point, but simply insists (as did the Ninth Circuit below) that *Metromedia* established a distinct "law of billboards" governed by its own unique rules. Opp. 13 n.10; Pet. App. 17-20a, 27a.

But that is *ipse dixit*, not legal reasoning. Indeed, as noted in the petition, other circuits have applied an underinclusivity analysis in the context of commercial sign regulations. *See, e.g.*, *Pagan v. Fruchey*, 492 F.3d 766, 774-78 & n.8 (6th Cir. 2007) (*en banc*); *Lavey v. City of Two Rivers*, 171 F.3d 1110, 1113-16 (7th Cir. 1999); *National Adver. Co. v. City & County of Denver*, 912 F.2d 405, 408-10 (10th Cir. 1990). At the end of the day, though, there is no denying the tension between the *Metromedia* plurality decision and this Court's subsequent precedents—but that is a reason for this Court to *grant* review, not *deny* it. The Ninth Circuit below effectively threw up its hands and declared that it was up to this Court to resolve that tension, *see* Pet. App. 27a, and on this point at least the lower court was right. The time has come for this Court to revisit *Metromedia*, and to provide long-overdue guidance to the lower courts, local governments, and sign owners regarding First Amendment constraints on commercial sign regulations.

REASONS FOR GRANTING THE WRIT

I. This Court Should Revisit *Metromedia*.

As a threshold matter, Los Angeles appears to be in denial about the issue presented in this case. According to Los Angeles, "[t]his case concerns a city's right to place advertising signs on its own bus shelters." Opp. 2. But no one is challenging Los Angeles' "right to place advertising signs on its own bus shelters." *Id.* Rather, this case concerns Los Angeles' efforts to prevent *petitioner* from placing identical advertising signs on *private* property.

In particular, petitioner contends that Los Angeles has violated the First Amendment by banning new commercial signs, ostensibly for aesthetic and safety reasons, while simultaneously authorizing the placement of thousands of identical signs on City-owned "Street Furniture" across the City. This is a classic underinclusivity challenge to a commercial speech restriction. *See, e.g.*, *Greater New Orleans*, 527 U.S. at 188-95; *Discovery Network*, 507 U.S. at 424-30. Indeed, the district court below had no difficulty upholding the challenge under this line of cases. *See* Pet. App. 63-85a.

Los Angeles insists, however, that *Metromedia* stands for the sweeping proposition that, as a matter of law, "a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment." Opp. 16; *see also id.* at 4 ("[A] ban on billboards will continue to satisfy the 'direct advancement' element of the *Central Hudson* test even where a city carves out an exception for certain signs, such as onsite signs or, here, for bus shelter signs.") (referring to *Central*

Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980)). That argument, however, cannot be squared with the commercial speech precedents noted above.

Los Angeles thus retreats (as did the Ninth Circuit) to the argument that *Metromedia* fenced off "the law of billboards" as a ghetto within this Court's broader commercial speech jurisprudence. *See* Opp. 13 n.10; *see also* Pet. App. 27a; *Ackerley Commc'ns of N.W. Inc. v. Krochalis*, 108 F.3d 1095, 1099 & nn.5, 6 (9th Cir. 1997). But the *Metromedia* plurality purported to apply the very same *Central Hudson* test that this Court has continued to apply in the commercial speech context more generally. *See* 453 U.S. at 507-12 (plurality). And that test requires courts to analyze, among other things, whether the challenged regulation "'directly advances'" the governmental interests asserted, *id.* at 507-08 (quoting *Central Hudson*, 447 U.S. at 566)—*i.e.*, whether the challenged regulation is underinclusive, *see, e.g.*, *Greater New Orleans*, 527 U.S. at 188-95; *Discovery Network*, 507 U.S. at 424-30. Indeed, the *Discovery Network* Court specifically rejected the notion that *Metromedia* categorically foreclosed any and all underinclusivity challenges in the context of commercial sign regulations. *See id.* at 425 n.20.

Nor is there any merit to Los Angeles' assertion to that "[t]here is no ... conflict among the circuits on the specific legal issue at the heart of the instant case, which is whether a de facto exception to a city's ban on billboards causes the ban to violate the First Amendment." Opp. 8. As noted in the petition, there is indeed such a conflict: whereas the Ninth Circuit holds that underinclusive commercial sign

regulations do not violate the First Amendment as a matter of law, other circuits recognize that such regulations are subject to underinclusivity scrutiny. *Compare* Pet. App. 20-33a; *Clear Channel Outdoor Inc. v. City of Los Angeles*, 340 F.3d 810, 816 (9th Cir. 2003) (if a commercial sign regulation serves a valid governmental interest, "it should not matter that it is underinclusive"); *Ackerley*, 108 F.3d at 1099-1100 ("As a matter of law Seattle's ordinance, enacted to further the city's interests in esthetics and safety, is a constitutional restriction on commercial speech without detailed proof that the billboard regulation will in fact advance the city's interests.") *with Pagan*, 492 F.3d at 774-78 & n.8 (applying underinclusivity analysis to commercial sign regulation); *Lavey*, 171 F.3d at 1113-16 (same); *Denver*, 912 F.2d at 408-10 (same).

Lurking beneath all of these cases is substantial confusion over what binding legal principles, if any, can be gleaned from this Court's splintered decision in *Metromedia*, and how any such principles can be reconciled with subsequent commercial speech cases. Los Angeles tries to gloss over this confusion by declaring that "[t]he *Metromedia* Court *did* produce binding law" insofar as "a majority of that Court, comprised of the four-Justice plurality and Justice Stevens's dissent, expressly ruled that a city may impose a city-wide ban on all new offsite commercial signs, and that such a ban may exempt onsite and other specified types of signs, all without violating the First Amendment." Opp. 16 (emphasis in original); *see also id.* at 6 ("[A] clear majority of the *Metromedia* Court (composed of a four-Justice plurality and Justice Steven's [*sic*] express joinder with the plurality's commercial speech ruling) did

hand down a firm ruling upholding local bans of new billboards.").

As Los Angeles recognizes elsewhere in its brief, however, this is no way "[t]o determine if a controlling opinion exists." Opp. 9 n.7. Rather, "the holding of a majority of the Court can be viewed as that position that reflects the narrowest ground for agreement *among the five Justices that comprise the majority*." *Id.* (emphasis added; citing *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997), and *Marks v. United States*, 430 U.S. 188, 193 (1977)). A dissenting opinion is not entitled to any weight in this analysis. *See O'Dell*, 521 U.S. at 160; *Marks*, 430 U.S. at 193. Because the plurality and concurrence in *Metromedia* shared no common analytical ground, that case did not establish any binding law, either with respect to commercial or noncommercial speech. *See, e.g., Rappa*, 18 F.3d at 1057-60; *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 470 n.9 (6th Cir. 1991), *aff'd*, 507 U.S. 410 (1993).

Los Angeles thus errs by arguing that *Metromedia* established binding law in the context of commercial speech, and trying to distinguish *Rappa* and *Discovery Network* as "cases deal[ing] with noncommercial speech." Opp. 8-9. The statutes at issue in *Rappa* restricted *both* commercial and non-commercial speech. *See* 18 F.3d at 1050-53 & n.10; *see also id.* at 1065 n.35 (noting that "[t]he statutes at issue in this case significantly limit some non-commercial speech as well as some commercial speech"). And the ordinance at issue in *Discovery Network* also targeted commercial speech. *See* 946 F.2d at 466 & nn.1, 2; 507 U.S. at 412-13 & nn. 2, 3.

As noted above, however, both cases specifically held that *Metromedia* did not establish binding law in the context of commercial speech. *See Rappa*, 18 F.3d at 1057-60; *Discovery Network*, 946 F.2d at 470 n.9.

Indeed, *Rappa* crafted its own First Amendment analysis applicable to both commercial and noncommercial sign restrictions. *See* 18 F.3d at 1065. Then-Judge Alito concurred in *Rappa* to "endorse" that analysis "[u]ntil the Supreme Court provides further guidance concerning the constitutionality of sign laws." 18 F.3d at 1080 (Alito, J., concurring). Because Los Angeles cannot deny that the Third Circuit in *Rappa* applied an entirely different analysis than the Ninth Circuit below, the City dismisses *Rappa* as an outlier that "no other circuit" has followed, Opp. 9 n.6—thereby only underscoring the circuit conflict on this issue.

Los Angeles argues, however, that this Court "expressly reaffirmed" *Metromedia* in *City of Ladue v. Gilleo*, 512 U.S. 43, 49-50 (1994), and *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (1984). Opp. 11. But neither of those cases (unlike *Metromedia*) involved a restriction on commercial signs on private property, which is why the decision below relied on *Metromedia*, not these other cases. Indeed, *Ladue* underscored that *Metromedia* had "'invalidated the San Diego ordinance in its entirety.'" Pet. 16 (quoting 512 U.S. at 49).

Los Angeles also asserts that "overturning *Metromedia* would undo three decades of jurisprudence that has carefully balanced the respective rights of sign companies, local governments, and the public." Opp. 6. As an initial

matter, as explained above, there is nothing to "overturn[]," *id.*: *Metromedia* produced no majority opinion, and actually invalidated the challenged San Diego ordinance in its entirety. And as to the assertion that the lower courts have applied a "careful[] balance[]" in this area, *id.*, the decision below only underscores that some lower courts interpret *Metromedia* to *exempt* commercial sign regulations from the careful balance otherwise applicable to commercial speech regulations. *See, e.g.*, Pet. App. 19a, 27a; *Ackerley*, 108 F.3d at 1099-1100.

In particular, the decision below underscores that some lower courts interpret *Metromedia* to require them to "give[] a generous amount of deference to cities to decide how to implement local bans on billboards," including deference with respect to exemptions. Opp. 5. But such deference is yet another reason why it is impossible to square the *Metromedia* plurality opinion with this Court's broader commercial speech jurisprudence, which does *not* defer to the very government entities that have restricted commercial speech in the first place. The "principled line of jurisprudence" to which Los Angeles refers, Opp. 10, thus represents a wholly unprincipled deviation from generally applicable First Amendment law.

At bottom, it is hard to overstate the confusion spawned by this Court's splintered decision in *Metromedia*. Even the Ninth Circuit did not deny this confusion, but insisted that this Court alone had "'the prerogative'" of revisiting its decisions. Pet. App. 27a (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484

(1989)). This Court should now exercise that prerogative to provide guidance on the important and much-litigated issues in dispute here.

II. Los Angeles' Underinclusive Ban On Commercial Signs Violates The First Amendment.

Turning to the merits of petitioner's First Amendment claim, Los Angeles insists that its ban on new commercial signs is not unconstitutionally underinclusive. According to the City, "the de facto exception for bus shelter signs does not cause [the] ban to lose virtually all effectiveness in furthering the goals of improving aesthetics and traffic safety." Opp. 14.

The Ninth Circuit, however, never reached this issue. Instead, in light of its expansive interpretation of *Metromedia*, the court held that the exceptions to Los Angeles' ban do not render that ban underinclusive *as a matter of law*. According to the Ninth Circuit, because *Metromedia* rejected an underinclusivity challenge to the San Diego sign ordinance at issue there, petitioner's underinclusivity challenge to the Los Angeles sign ordinance at issue here necessarily fails too. *See* Pet. App. 20-33a. In particular, the Ninth Circuit held, "*Metromedia* upheld a ban on offsite commercial advertising that included an exception for bus stop benches," which the court analogized to Los Angeles' exception for "Street Furniture." Pet. App. 21a.

But nothing in *Metromedia* suggests that *any and all* exemptions for structures associated with public transportation necessarily satisfy First Amendment scrutiny as a matter of law. To the contrary, courts cannot assess underinclusivity in the abstract, but

must carefully analyze the operation of a specific challenged scheme. Whether a particular exception renders a general ban on commercial speech fatally underinclusive depends on the scope of that particular exception. Indeed, it is hard to put this point any better than Los Angeles itself has done: "[t]he [underinclusivity] analysis under the third part of the *Central Hudson* test has always been fluid, fact-specific, and dependent on degree." Opp. 15.

The problem here is that the Ninth Circuit below interpreted *Metromedia* in a *rigid* manner to resolve this case as a matter of law. Los Angeles defends that categorical approach by asserting that "[b]us shelter signs, *being inherently limited in number and size*, pose no threat of undermining a ban on billboards." Opp. 4 (emphasis added). But there is nothing "inherently limited" about the "number and size" of "bus shelter signs" as a matter of law. That is particularly true in light of Los Angeles' capacious definition of "bus shelters." *See* Opp. 2 n.1 ("The term 'bus shelters' will be used in this brief to collectively refer to covered bus benches and other street furniture such as informational kiosks and automated public toilets."). As the district court explained, the "Street Furniture" at issue here includes "automated public toilets, kiosks, news racks, and transit shelters." Pet. App. 43a.

Thus, the district court (which, in sharp contrast to the Ninth Circuit, actually analyzed the operation of the Los Angeles scheme) had no trouble concluding that the "colossal exception" carved out for the "Street Furniture" rendered the ban unconstitutionally underinclusive under *Greater New*

Orleans and *Discovery Network*. Pet. App. 83a. As the district court explained, "'[t]he operation of ... [the] regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.'" Pet. App. 72a (quoting *Greater New Orleans*, 527 U.S. at 190).

Perhaps sensing that it cannot win the underinclusivity point, the City trots out the alternative argument that "Los Angeles' own bus shelter signs, which are governmental speech, [are] not subject to the First Amendment." Opp. 21. That argument totally misses the point. As the City itself explains, citing *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1130 (2009), there is a fundamental distinction under the First Amendment between "the government's own expressive activity" and "the government's regulation of private speech." Opp. 21. Because this case is about the government's regulation of private speech, it does not implicate the "government speech" doctrine at all. Petitioner does not seek to interfere with the City's speech, but to prevent the City from banning petitioner's own speech.

The City apparently believes the "government speech" doctrine means that "government speech" is *wholly invisible to the First Amendment*, so that "the bus shelter signs should not be considered at all when analyzing the constitutionality of the ban." Opp. 21-22. That argument is baseless. As noted above, the "government speech" doctrine is based on the premise that the government acts in very different roles as speaker and regulator. Where, as here, the government acts in its role as regulator, the ordinary rules governing government regulation of

speech apply. Thus, the City must defend its ban on commercial speech by proving that the ban directly advances the City's asserted interests in a narrowly tailored way. As part of that analysis, it is both necessary and appropriate to consider the City's own speech—not to abridge that speech, but to assess the validity of the City's ban on private speech. *See, e.g.*, *Greater New Orleans*, 527 U.S. at 188-95 (invalidating statute banning advertising for private casinos but not government casinos). The First Amendment does not allow the government to suppress private speech to make its own speech more valuable.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
LAURA ALEXANDER
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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In the
Supreme Court of the United States

METRO LIGHTS, L.L.C.,

Petitioner,

– v. –

CITY OF LOS ANGELES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* ATLANTIC OUTDOOR ADVERTISING, INC. and WILLOW MEDIA, LLC

BURT NEUBORNE
Counsel of Record
40 Washington Square South
New York, New York 10012
(212) 998-6172

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348 U.S. 483 (1955) 6

Interest of *Amici Curiae* [1]

Amici, Atlantic Outdoor Advertising Inc. and Willow Media, LLC, are engaged in the business of placing and maintaining commercial signs on private property. The signs provide consumers with accurate information about their economic options. Despite the conceded importance of the flow of commercial information to a free market economy, *amici* operate in a highly unstable legal environment, reflecting massive confusion over the legal effect of *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

In recent years, moreover, the regulatory climate affecting *amici* has been further confused by an increasing tendency on the part of municipal governments to view the regulation of commercial signage as a revenue-producing activity. For example, in this case, the City of Los Angeles has entered into a $150 million multi-year exclusive agreement with CBS-Decaux LLC ("CBS"), to place and maintain "Street Furniture," an Orwellian name for commercial signage, on Los Angeles bus shelters, and has used its ill-defined regulatory powers under

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[1] This brief *amicus curiae* in support of petitioner's application is filed in accordance with Rule 37.2(a). Written consents by all parties to the filing of this brief have been lodged with the Clerk of the Court. Petitioner's application for a writ of *certiorari* was filed on August 31, 2009. Notice of intent to file this brief was mailed the parties on September 15, 2009. No counsel for a party authored this brief in whole or in part; nor did any person other than *amici* make a monetary contribution to the preparation or submission of this brief.

Metromedia to ban virtually identical commercial signs on private property that would compete with CBS's monopoly.

In view of the importance of the free flow of commercial speech, *amici* urge the Court to grant petitioner's application for a writ of *certiorari* in order to: (1) clarify the power of municipalities to regulate off-site commercial signage under *Metromedia;* and (2) limit the power of municipal governments to bestow commercial speech monopolies on favored speakers in return for a cut of the profits.

Statement of the Case

The narrative facts of this case are fully set forth in petitioner's application for a writ of *certiorari*, and in the thorough opinion of the District Court annexed to petitioner's application. It is, however, worth emphasizing that the Los Angeles ordinance before the Court is blatantly and discriminatorily under-inclusive. In the name of aesthetics and traffic safety, the ordinance flatly prohibits all off-site commercial signage abutting the public streets, while licensing a favored commercial speaker to display essentially identical commercial signs on Los Angeles bus shelters.

The blatantly discriminatory nature of the Los Angeles ordinance is neither inadvertent, nor the result of a flawed regulatory process. It reflects an agreement between the City of Los Angeles and its hand-picked franchisee that guarantees the City at

least $150 million (and perhaps a great deal more, depending on advertising revenue), in return for maximizing the economic value of the franchisee's signs at the expense of potential competitors. Indeed, not only has the City exempted its franchisee's revenue-generating bus shelter signs from the advertising ban that applies to everybody else, but the City allows its franchisee to construct scores of free-standing three-sided advertising "kiosks" that are not in any way connected to bus shelters.

ARGUMENT

I. THE ISSUES POSED BY PETITIONER WARRANT SUPREME COURT REVIEW

A.

Clarification of *Metromedia* is Long Overdue

In the 33 years since this Court formally recognized that commercial speech is protected by the First Amendment, the Court has repeatedly stressed the importance to a market economy of the free flow of accurate commercial information. *Virginia Pharmacy Board of Examiners v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates v. Township of Willingboro*, 431 U.S. 85 (1977); *Carey v. Population Services Int'l*, 431 U.S. 678 (1977); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *44 Liquormart,, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

Most importantly in the context of this case, the Court has repeatedly recognized that, under the four-part test enunciated in *Central Hudson*, government's assertion of a constitutionally sufficient interest in censoring the free flow of commercial information is undercut when the regulation fails, in fact, to advance the asserted governmental interest, or is more extensive than reasonably necessary. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1983); *Edenfield v.*

Fane, 507 U.S. 761 (1993); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173 (1999); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002).

On the other hand, all agree that some regulation of the "time, place or manner" of off-site commercial signage is permissible in order to advance government interests ranging from aesthetics to traffic safety.

Metromedia sought to establish enduring ground rules governing municipal regulation of off-site commercial signage that would harmonize the importance of the free flow of commercial information with concerns over aesthetics and traffic safety. Unfortunately, the case, decided 28 years ago during the infancy of the commercial speech doctrine, failed to generate either a majority opinion, or a coherent rationale. The result has been almost three decades of chaos in the lower courts concerning the legal status of off-site commercial signage. The confused analysis of the Ninth Circuit panel, reversing a thoughtful District Court opinion, illustrates the current wide disparity in the lower courts' understanding of *Metromedia*. It sounds a plea for guidance that should be heeded by the Court.

B.

Economically Self-Interested Regulation of Commercial Speech Should Trigger the Most Exacting Judicial Scrutiny

When government acts as a *neutral* regulator of the economy, it is entitled to judicial deference. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

When government acts as a *neutral* regulator of the flow of commercial information, while a degree of heightened judicial scrutiny is appropriate to protect commercial free speech from unjustified or improperly motivated, censorship, due deference should be accorded to legitimate exercises of regulatory authority. *Central Hudson Gas & Elec. Co. v. Public Service Comm'n*, 447 U.S. 557 (1980); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

When, however, as here, government abdicates all pretense of regulatory neutrality by acquiring a direct economic stake in the outcome of the regulatory process by granting an exclusive commercial speech concession to a favored speaker (who has paid at least $150 million for the privilege), and then using its regulatory power to eliminate potential competitors, such an economically self-interested exercise of regulatory power is not worthy of deference. To the contrary, such a financially self-interested exercise in censorship should be subjected to the most exacting level of judicial scrutiny.

Los Angeles may well have the power to enter into an exclusive contract for commercial signage on its rights of way. But, in the absence of the most compelling justification, Los Angeles may not act to maximize the economic value of the bus shelter contract by using its regulatory power to stamp out competing commercial speakers operating on nearby private property. It bears emphasis that Los Angeles enacted the advertising sign ban at issue in this case in April 2002, just four months after it entered into its $150 exclusive franchise with CBS. The First Amendment is not for sale, even in a commercial context.

This Court has long recognized the distinction between a "market regulator" and a "market participant." Compare *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), with *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). In the Commerce Clause area, the distinction has tended to increase the power of local government by permitting a "market participant" to behave in ways that would be denied to a "market regulator."

This case is the obverse of the Commerce Clause "market participant" cases. Whatever power Los Angeles might enjoy as a neutral "market regulator" under *Metromedia* to pick and choose among identically situated commercial speakers, surely, once Los Angeles becomes a "market participant" by acquiring a massive economic stake in the outcome, it may not deploy its regulatory powers to favor a commercial speaker who has purchased favorable regulatory treatment.

It is an axiom that no person should be a judge in his or her own case. The principle applies to regulators, as well. This Court has ruled that the Due Process Clause forbids a judge or an administrative adjudicator from presiding over an adjudicatory proceeding when the adjudicator has a substantial financial interest in the outcome. E.g., *Tumey v. Ohio*, 273 U.S. 510 (1927) (criminal proceeding); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (criminal proceeding); *Gibson v. Berryhill*, 411 U.S. 564 (1973) (administrative proceeding); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (civil proceeding).[2]

When, as here, economic self interest is transposed from an adjudicatory to a regulatory setting, the economically self-interested nature of the regulator should, at a minimum, trigger searching judicial inquiry into the adequacy of the purported regulatory justifications. Moreover, when, as here, the economically self-interested regulation blatantly discriminates between and among identically situated commercial speakers, the regulatory decision should be subject to the most exacting judicial scrutiny.

It is undeniable that Los Angeles acquired a significant economic interest in the outcome of the regulatory process before this Court. Indeed, the

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[2] All nine Justices in *Caperton v. A.H. Massey Coal Co., Inc.*, __ U.S. __, 129 S. Ct. 2252 (2009), agreed that a direct financial interest in the outcome of an adjudication would preclude an interested judge from presiding.

extraordinary $150 million fee paid by CBS to Los Angeles can be explained only by Los Angeles' willingness to use its regulatory power under *Metromedia* to eliminate CBS's competition.

The Los Angeles commercial speech ban before the Court cannot survive any form of heightened judicial scrutiny. The under-inclusive reach of the ordinance leaves CBS free to display massive amounts of commercial signage on the City's rights of way, while banning competitors from displaying identical signs on nearby private property, thereby undercutting the City's reliance on aesthetics and traffic safety. Moreover, the flat ban on commercial signs on private property is far more Draconian than necessary to achieve any plausible regulatory end.

CONCLUSION

For the above-stated reasons, a writ of *certiorari* should issue to review the decision of the Ninth Circuit panel below.

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New York, New York

Respectfully submitted,

Burt Neuborne
(Counsel of Record)
40 Washington Sq. South
New York, N. Y. 10012
(212) 998-6172
burt.neuborne@nyu.edu

Attorney for *Amici Curiae*